

A N O T H E R
L E T T E R

T O

Mr. A L M O N,

I N

M A T T E R O F L I B E L.

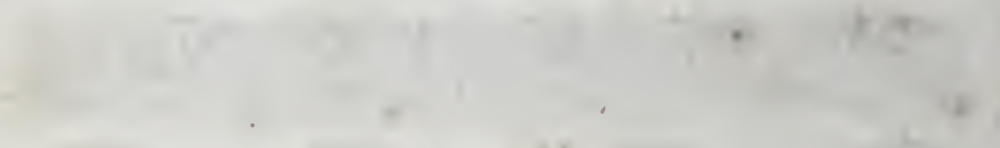
Tros Rutulusve fuat nullo discrimine habebo.

L O N D O N:

Printed for J. A L M O N, opposite Burlington-House,
Piccadilly. 1770.

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A N O T H E R L E T T E R

T O

Mr. A L M O N,

I N M A T T E R O F L I B E L.

Tros Rutulusve fuat nullo discrimine habebo.

S I R,

Aug. 5, 1770.

NOTWITHSTANDING the retired situation of my life, I have by accident, whilst in the country, heard of some late legal incidents which have excited my attention. Permit me, therefore, to say a word to you about them. They seem to forbode, I think, a revival of the obsolete, arraigned, and condemned doctrine about State-libels, and to betoken a renewal of the sophistical and ingenious fictions which formerly were wont to be practised in its support. For my own part I cannot, from the abuse of the press, be brought entirely to damn the thing itself; let the virulence, the profligacy and outrageousness of hireling, interested or factious writers be ever so great. Nevertheless, I am frank to confess, that the most infamous scandal is daily spread by the most abandoned of men through this channel, and that the present system of party-writing seems

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to be to attack the constitution and government, instead of assailing and traducing the administrators of it. It is with pleasure, therefore, I see the authors and propagators of such dangerous productions prosecuted. But, from a desire of suppressing these pests of society, let not the officers of law overstep the line of justice, nor substitute artificial for real conviction, and thereby give footing to a code of libel-polity, which may hereafter be turned to the destruction of all liberty in the press, the best and only bulwark of manly freedom and liberal science.

I was told some time ago, that by a verdict in the case of a certain libeller, he was found *guilty of printing and publishing only*. I could scarcely credit my informant, and said, surely the Judge must have refused to take such a partial verdict, and must have instructed the Jury, that it was their province to find the defendant guilty or not guilty of the charge; that is, of wickedly and seditiously putting forth the paper. But my friend assured me, the fact was as he had related it. I begged then to know whether this unusual verdict was delivered in the common way, in open court, in presence of the council. His answer was no, it was a private verdict, given by consent, out of the county where the trial was had, at ten at night, in the midst of a mob, who entered the Judge's house along with the Jury. Upon which I asked, whether it was imagined that this mob had raised the fears of the Judge, and disordered

dered his understanding, adding, that be this as it might, I presumed the Jury had, according to the constant practice, when they deliver privy verdicts, been directed to come again the next morning into the public court, and been there interrogated, whether they had given such a privy verdict, and now stood to it. My friend returned, that no such thing was done. I contented myself with saying, this then will make some noise.

Agreeably to that surmise, I have been recently informed from news-papers and magazines, that the matter has already been stirred before the proper tribunal, where it has been deemed so extraordinary a case by the bench, as to be ordered to stand over for farther consideration, until the next term. A suspense of judgment, for the whole long vacation, will certainly give leisure for deliberation, as well as for proper converse upon the subject. At the same time it demonstrates a real difficulty or nicety in the thing, for otherwise, the present grand justiciary of England, so renowned for dispatch, would never have consented to any postponement. This learned personage is known to abhor delay, and to be perfectly free from craft. It follows, therefore, that he must be animated by the pure desire of maturer reflection upon the point, and not by the hope of compassing some hollow unanimity in his court, by private colloquing, or of warping their understanding by subtle distinctions, into some concession to a particular postulatum, or pre-

fumed legal hinge, upon which the whole may be speciously proved to turn.

• Indeed, I have heard it whispered, that this case is likened to that of the *K. against Bear*, which may be met with in several of the law reporters *, and was determined by the King's Bench, when the great Lord C. J. Holt presided. So auspicious an authority made me look into the books, and a curious case it seems to be, as well as most others, relative to this head of imperial offences. Metaphysics are introduced, common-sense for ever laid aside, and a technical interpretation put upon the simplest of all expression, the verdict of twelve plain men, neither bred to the law, nor to any other learned profession, unaccustomed to the refinements of scientific language, nay, absolute strangers to all the chicanery of words, and denominated for this, among other reasons, *the country*. One would think it was the aim of lawyers to perplex every thing, or they would never resort to professional quiddities as a glossary for the language of ordinary life. There is no other possible way of mistaking the true meaning, and of inducing a sense different from what was intended. Lord *Mansfield*, to his great honour, has, I know, always scouted this sort of learned folly, and very early gave a happy presage of the liberality of his future proceedings. The story goes, that a diligent book-read advocate, one day was citing be-
fore

* Carthew, Salkeld, 12th Modern, Lord Raymond,

fore him (soon after his promotion to the bench) several black-letter cases, to prove the genuine construction of an old woman's deed; whereupon his Lordship interrupted the stream of this learning, by asking, whether he thought the old woman had ever heard of those cases, and, if not, what common-sense must say to the matter; and immediately decreed for common-sense against Dyer, and one other most learned reporter, to the absolute discomfiture and astonishment of the pains-taking counsellor, and the satisfaction of the whole audience. If this acute Lord acted thus, where the matter was reduced into writing by some attorney, in all probability, what must be his conduct with respect to a verdict delivered *ore tenus*, by word of mouth merely, by twelve mere laymen?

But let us now see how far the case of the *King against Bear*, when rightly understood, is or is not a precedent for governing the determination in the matter actually depending. *Bear* was indicted * for “ treacherously falsely
“ and

* “ Quod subdolè falso & malitiosè composuit scripta
“ & fecit & componi scribi & fieri causavit ac sibi pro-
“ curavit & industrè collegit separale scandalosos falsos &
“ seditiosos libellos continent. in se de domino rege nunc
“ & ejus æqua gubernatione quamplurima falsa mali-
“ tiosa & seditiosa verba & sententias materias diction-
“ & expression (viz. in uno libello eorum intitulat. *The*
“ *Belgic Boar, to the Tune of Chevy-Chace* —) quos qui-
“ dem falsos & scandalosos libellos (quorum diversi fu-
“ erunt impressi) ipse predict. *J. Bear*, 19 Oct. & diu
“ postea in manibus & custodia suis & penes se scienter &
“ advisatè clandestinè & seditiosè habuit & custodivit in
“ promptu

“ and maliciously composing writings and
 “ making and causing to be composed written
 “ and made and procuring and industriously
 “ collecting several scandalous false and se-
 “ ditious libels containing in them very many
 “ false malicious and seditious words and
 “ sentences matters sayings and expressions of
 “ the Lord the now King and of his just
 “ government (to wit, in one of those libels
 “ intitled *The Belgic Boar to the tune of*
 “ *Chevy Chase &c—*) which false and
 “ scandalous libels (several whereof were
 “ printed) he the said Bear knowingly and
 “ clandestinely and seditiously on such a day
 “ and long afterwards had and kept in his
 “ own hands and custody and power in rea-
 “ diness to be dispersed divulged and pub-
 “ lished among the subjects of the said Lord
 “ the King and factious and malicious per-
 “ sons.” The Jury thereon found * “ that
 “ as to the writing and collecting only of
 “ the libels in the indictment mentioned the
 “ defendant was guilty and as to all the rest
 “ in the said indictment contained that he
 “ was not guilty thereof.”

It

“ promptu & parat. ad eosdem inter subditos dicti do-
 “ mini regis & factiosas & malitiosas personas disper-
 “ gend. divulgand. & publicand.”

* “ Quoad scriptionem & collectionem libellorum in
 “ indictamento mentionat. tantum quod defendense est cul-
 “ pabilis & quoad totum residuum in eodem indicta-
 “ mento content. quod defendens non est inde culpabi-
 “ lis.”

It was objected in arrest of judgment, that none could be given against the defendant upon this verdict, because the Jury had acquitted him of all that part of the indictment which was criminal, and found him guilty *only of writing and collecting* libels, which was rather a folly than a crime ; and that in Lamb's case in Lord Coke it was expressly resolved, that the defendant must be found to be either the *contriver or procurer, or publisher of a libel*, otherwise he could not be convicted as a libeller *.

Indeed, to a common understanding, the Jury by finding him guilty of writing and collecting *only*, and by expressly finding him not guilty of all the residue of the indictment, had acquitted him of either making, or composing, or intending to publish, as clearly as it was possible. But the Court determined otherwise, and their reasons are worth relating. The Chief Justice said, that
 ‘ he did not regard the *collecting*, and it was
 ‘ not the infamous matter or words which
 ‘ made the libel, for if a man had *spoken*
 ‘ such

* In the case of *Lamb*, a Proctor, 9 Co. 59 b. and the 8 Jac. 1. it was resolved, even in the Star-Chamber, “ that every one who shall be convicted ought to be a
 “ contriver of the libel, or a procurer of the contriving
 “ of it, or a malicious publisher of it, knowing it to be
 “ a libel. If he writes a copy of it, and does not publish it to others, it is no publication of it.” And the case of the Archbishop of Canterbury, or *de libellis famosiss*, in the 3 Jac. 1. 5 Coke 125, does not carry the doctrine farther ; but, if it had, being a prior case it must have been controlled by that of *Lamb*.

‘ such words, he would not be guilty of
 ‘ making a libel, it was the *writing* which
 ‘ worked that effect, for it was not a libel
 ‘ before it was written ; and, the writing
 ‘ being the essential thing, the copier of a
 ‘ libel was a maker of one, for the copy
 ‘ contained all things necessary to the consti-
 ‘ tution of a libel, viz. the scandalous mat-
 ‘ ter and the writing, and therefore the copy
 ‘ of a libel was a libel, and of course the
 ‘ writer of such a copy, a libeller. Indeed,
 ‘ in all cases where a man does the act,
 ‘ which act causes the thing to be that which
 ‘ it is, that man ought to be construed the
 ‘ doer of such a thing. The copy had also
 ‘ the same pernicious consequences, for it
 ‘ perpetuated the memory of the thing and
 ‘ some time or other would come to be pub-
 ‘ lished. Besides, bare writing was punish-
 ‘ able in the Star-Chamber *. That though
 ‘ the writer or collector never published these
 ‘ libels, yet his having them in readiness for
 ‘ that purpose, if any occasion should hap-
 ‘ pen, was highly criminal, and though he
 ‘ might design to keep them private, yet,
 ‘ after his death they might fall into such
 ‘ hands as might be injurious to the govern-
 ‘ ment, and therefore men ought not to be
 ‘ allowed to have such civil instruments in
 ‘ their keeping.’ He then twisted this fine-
 spun reasoning into the following logical
 thread. ‘ The making is the *genus*, and
 ‘ the

* This assertion is without authority.

‘ the composing, contriving, and writing,
 ‘ are the *species*. Therefore the finding the
 ‘ defendant guilty of the writing is the find-
 ‘ ing him guilty of the making.’ But, not
 content even with this, he proves the same
 thing, another way, thus. ‘ The matter
 ‘ abstractedly considered is unlawful, and
 ‘ therefore the finding must be taken to be
 ‘ criminal. And, this being so, if the
 ‘ writing was innocent, there ought to be a
 ‘ special finding of the particulars which
 ‘ distinguished and excused it.’ As to the
 puny justices *Turton and Rokeby*, they con-
 curred with their chief *in omnibus*, with due
 deference, and yet some how or other the
 latter said, “ that the verdict, being the
 “ words of lay people, ought to be under-
 “ stood according to the vulgar acceptation,
 “ and therefore though the writing in point
 “ of law were making, yet it was under-
 “ stood in common speech otherwise. And
 “ if the Jury found that the defendant did
 “ not make the libel, after which they should
 “ find that which amounted to the making,
 “ that would be repugnant and should be
 “ rejected, for all that was inconsistent with
 “ what they had found before.”

Had not this been a party matter, could
 it have been doubted whether the Jury meant
 to acquit the defendant of the atrocious
 part of the charge, of what constituted the
 crime, namely, of having composed, in-
 tended to publish, and written or collected,
 these writings, with an intent to vilify the

government? And, supposing the writing to be innocent, by what rule of justice could the *onus probandi* be put upon the defendant, when every man is to be presumed innocent until proved the contrary. Not one of the Jurors had ever heard, I dare engage, of *genus* or *species*, or of the consideration of any thing in the abstract. By what maxim of law or common sense then could the Court put a technical construction upon their words, and by that means forge a sense the very reverse of what was intended? The perversion is palpable and destructive of the end of Juries, inasmuch as it overturns their judgment, which is the judgment of the country, and substitutes that of so many regal judges, the precise evil against which the constitution had contrived the trial by Jury as its barrier.

It may not now be amiss to examine pretty particularly the logic of this determination, since it is growing into repute, and to see whether it be not arrant sophistry, notwithstanding the very respectable authority of my Lord Chief Justice *Holt*. The best men are insensibly swayed by party, and he was, it is known, a zealous revolutionist, and owed all his promotion to King William. His indignation, therefore, was likely to be inflamed by any attempt to disparage or disgrace that Prince. He must wish to check such unwarranted abuse of him, and, like every hearty friend to a cause, rather than not punish the object of resentment, was
willing

willing to strain a point and to create artificial, if he could not find real, ground in law for the purpose. He might conceive it was dexterity used for an honest end, and eventually for the support of civil liberty, this Monarch being the great prop both of that and the Protestant religion. Such motives are at least the best palliatives which I can suggest for so unprincipled a determination.

A small attention to the case will convince any body that there is one fallacy running through it, built on the double sense of the words *writing and making of a writing*, which primitively and naturally import the inscribing with a pen, pencil or *stylus*, but metaphorically and figuratively signify both the thoughts and language inscribed. Which of these senses be intended must be always ascertained from the drift of the user, and this may be collected from the subject and context. The inventive being superior to the manual faculty, the words are most frequently used, I allow, to denote the former. And, beyond all doubt, the making and writing of a libel mean, in common discourse, the composing of a libel ; as the author and indicter is usually styled the writer or maker of a book, nobody almost in speaking, ever pointing out and designing the mere copier and transcriber by those terms ; because the matter and contents of a literary performance are usually the theme of speech. However, among writing-mas-

ters, clerks, hackney-writers, amanuenses, private secretaries, and engrossers, (and perhaps special pleaders) the writer and maker of a writing signify generally the mere copier, and in this sense, copying is termed writing. The same application of the words is at times made by all people. This twofold signification furnished Lord Holt with a colour for proving every transcribing to be composing, or at least seditious making. And he effected it, as the reader cannot have forgotten, thus. “ The *genus* can always be predicated of each *species* within it. But making is a genus, and composing, contriving, and writing, are so many species under it. Therefore writing is making. Now Beare was the writer of the libel, *ergo* he was the maker.” However, as it is the logical privilege of a respondent to introduce a distinction wherever his opponent introduces an ambiguous term, I shall take the liberty of doing so here, after premising, that it is essential to right reasoning to use the same term uniformly in the same sense, and that the contrary is false logic ; and then I think the whole of this most curious ratiocination will fall to the ground.

In the case of Beare, where the charge was the composing and making of writings, the maker of them must mean the author, or at least a seditious copier with an intention of libelling and defaming, and not every simple penner or transcriber. It is likewise evident from what the Chief Justice said

said upon the occasion, that by maker he himself meant the author and composer, or some seditious copyist. Nevertheless, although in the major proposition he confines the term maker, to the author and seditious copier ; in the minor he extends it to every copier and transcriber. There is, therefore, a vitious ambiguity in using the same word in two different senses ; and the whole of the reasoning depends on this quibble, and paltry, disingenuous duplicity of language.

To prove that by maker the Chief must mean the author, or at least a seditious transcriber and intentional libeller, I need only recall to the reader's mind his Lordship's saying " such writing cannot be understood of an innocent writing, because " if any officer of the Court (or student of " the law) were to do it, it would be no " libel, inasmuch as it would not be done " ad infamiam of the party, but to bring " the offender to justice, and it would be " only *tenor libelli*, and upon such evidence " the defendant could not be found guilty." If this be so, then it is clear that the mere writing and transcribing of the identical words and very tenor of a libel, will not be making a libel, unless such writing and transcribing be done with an intention to defame. The writing out of a libel by an officer for the purpose of prosecution, or by a law-student for the sake of science, and (may I add) by a foreigner unacquainted with the meaning, by any native idiot, or by a school-boy

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for a task, is agreed to be innocent, and that upon evidence of such writing, the writer cannot be found guilty of a libel. Now, this being conceded, surely it follows of necessity, that the intention creates the essential difference, (to speak logically) and is the circumstance which constitutes the libel, so that the making of a libel cannot be predicated of every species of transcript or writing of it. But farther, the mere act of writing or transcribing, abstractedly considered, cannot be unlawful ; because all reference or application to any object, man, or thing in particular, is then to be withdrawn, and nothing but a pen and ink with a hand moving it on paper can remain. And consequently, if a Jury find a man guilty only of the act of writing and transcribing, that finding cannot be taken to be criminal in an universal or general sense, or in the abstract, but must be so taken in some particular and peculiar sense, and this therefore ought to be made out as a special case by proper proof.

Is not all this fairly deducible from Lord Holt's own principles, and, if it be, what can be said for his determination, which from the same premises, drew the opposite conclusion.

If simply writing out a libel were the making of it, a law-transcriber, and every transcriber of the tenour of a libel, must be a libeller *ipso facto*, and proof of such writing out or transcribing, must be conclusive evidence

evidence to find him guilty. But Lord *Holt* maintains the contrary.

In reality the principles laid down in the *King against Beare* are just. They contain the true rules for a Jury to go by, in determining whether a man ought to be found a libeller or not, and furnish also the true doctrine for construing or interpreting verdicts when delivered out of the common form. The Jurors are thereby taught that they must collect from the complexion of the case, and all the circumstances attending it, the intention of the writer, and, if they perceive the original composition, or the subsequent transcript to have been made with no view to traduce or to villify, that they ought to find the defendant not guilty; because the Judges cannot determine from the face of the writing, especially in the case of a copy, whether it was done *ad infamiam* or not, this being a fact and resulting from the intention of the writer; nor whether such writing was made by him as an officer of justice or a law-student for his profession, &c. all of this depending upon the fact, and being mere matter of evidence for the Jury, who, if such writing were made by such officer or student, ought not after proof thereof, to find him guilty. Then as to the interpretation of the finding of any Jury, this same case establishes that the terms must be taken in their common and ordinary sense. For Mr. J. Rokeby lays down (really not unreasonably) that
 “ the

“ the words of lay-people ought to be understood according to the vulgar acceptance ; and therefore, though writing in construction of law be making, yet, as it is understood in common speech otherwise, it ought to be taken accordingly.” From whence it is apparent that the finding of a man guilty of the writing is not in the language of a Jury the finding him guilty of the making a libel.

Upon the whole, the foregoing case indisputably establishes these axioms, that, whether the writer be author or copier, his being a libeller or not depends upon the intent with which he made the writing ; that the Jury must be convinced the writing was made *ad infamiam*, before they can, on the evidence of the writing merely, find the writer guilty of a libel thereby ; and that if they do not bring him in guilty, or not guilty, of the indictment, generally, their verdict must be construed according to its natural and common import in ordinary speech, and the words of it be neither forced from their artless and native meaning into a technical and scientific one, nor be carried to matters to which they do not refer.

For which reason, where there are more charges than one in an indictment, as in the case of *Beare*, namely, writing, collecting, making and intending to publish, if the Jury find the defendant guilty only of the writing and collecting, and not guilty as to
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the rest, it is a complete verdict, and is an evident acquittal of the defendant as a libeller ; because we have proved from my Lord Holt's own mouth, that writing may signify copying, and that copying and collecting may be innocent, as in the very cases which he puts. Where then such writing and collecting have been charged to have been done with malice, and the defendant is found guilty *only* of the writing (that is, of the copying) and collecting, the word *only* (one would imagine) must mean to negative the imputation of malice which was charged on the writing and collecting ; the word *only* could otherwise have no valid and necessary meaning, but at best must be surplusage. Besides, the finding the defendant *not guilty as to the rest* goes to the other charges of making and intending to publish, and the word *only* need not have been inserted to negative them, for which reason it must have been inserted to negative the malice suggested of the writing and collecting. And further, where a word can have any operative and proper meaning, it is never, according to the rules of grammatical or legal construction, to be considered as surplusage. Moreover, if the thing be doubtful, the favorable construction is always to take place.

In truth, where the Jury are dubious upon the evidence as to the intent, they should of themselves, in mercy, find the defendant not guilty. But, if they do not choose to do that, disliking, perhaps, the man or his party, and

being uncertain, whether he may not be guilty of some bad intent by his writing or copy, although no such be satisfactorily made out, and therefore cannot be prevailed upon (where the scales are so even) to incline to the favourable side, and will rigidly find the man guilty of making the writing or copy; and yet, on the other side, they will not venture to say upon oath, that they believe he made the writing seditiously and maliciously, being not convinced, in their own minds, that there was real malice or sedition therein, and therefore scrupulously insert the word *only*; I say, in such case, the merciful law of England does the thing which the rigid Jury will not do, and obliges the Judges to pronounce the defendant acquitted.

Upon this legal ground it might be maintained, that had the finding fallen short of what it was, by dropping the word *only*, the court ought to have considered the subsequent words of *not guilty as to the rest of the indictment*, as intended to acquit the defendant of every thing but what the Jury had expressly found him guilty of, viz. *the writing and collecting*, and that otherwise, they would certainly have added the words *seditiously and maliciously*; and that without such addition, there was no crime found. Indeed the court cannot, by implication, supply those, or any words in a criminal case, because a man is to be proved and found, and not presumed, to be guilty, and every thing must be taken most favourably for him. “ All Courts of
“ Justice

“ Justice, more especially on the plea of not
 “ guilty, must go, *secundum allegata & pro-*
 “ *bata*; if therefore the prosecutor does not
 “ maintain, by his proofs, the matter he has
 “ alledged to the Court, he must fail of the
 “ justice he would demand upon those alle-
 “ gations, and with this agrees the rule of
 “ the civil law, *quod probationes sint conformes*
 “ *libello.*”

For all which reasons, the determination in the *King against Beare*, stands self-condemned. So much, I think, one may venture to say, is clear beyond the possibility of a doubt.

It would have been, I must allow, a stronger case, had the indictment been preferred against Beare, merely for *seditionously writing and collecting*, and for no other causes, and the Jury had thereon found him guilty of *writing and collecting only*; because, in such case, the word only could have no possible other meaning, than to negative the sedition, and it being contrary to all rule of construction to give a word no meaning, and to regard it as surplusage where a proper and a significant meaning may be given to it, this interpretation must have been submitted to.

But there being in the case of *Beare*, other matter laid besides writing and collecting (as has been before observed) namely, making and publishing it; perhaps it was contended, that *only* was no more than an implied negative, and that the additional words of *not guilty as to the rest of the indictment* were an ex-

press negative of those other matters, and therefore both the one and the other were applicable to the same things, and for that reason, the word *only* need not be construed to negative the malice and sedition with which the writing and collecting were charged, and, if it were not so construed, that then the finding of the defendant guilty of writing and collecting, would be a complete finding him guilty of all that part of the charge as laid, to wit, seditiously and maliciously. Upon this footing alone could the determination in the *King against Beare* be pretended to be justified. And yet this will not do, for the answer before given will apply to it, namely, that sedition and malice cannot be affirmed of every writing of libellous words, because they cannot be affirmed of that of the clerk of indictments, or of the law student; the one does not universally comprize the other, therefore, the finding of the writing only, is not the finding of the sedition, more especially in criminal proceedings. A Jury may, if they please, find guilt, by inference, without positive proof; but where *they* do not find it expressly, no court can presume it.

There is, besides, another obvious answer, which is this: it is possible the Jury might mean, by the word *only*, to confine their verdict to the bare writing and collecting, and to negative the wicked purpose with which it was charged to have been done; and, this being possible, undeniably it was the duty of the Judge, seeing the finding to be capable of

of both interpretations, to ask which of them was agreeable to their meaning, because that, and not the court's, was to be taken. But, if he omitted to do this at the time, he was bound afterwards to adopt the milder and most merciful interpretation, according to all the dicta of all the books. The reason why he did not, he that runs may read.

I can suggest to myself but one other shift which could be had recourse to, and that is the following: it might be urged, that the whole charge and trial being of a criminal nature, the defendant could not be an innocent man, and be found guilty of any part of it; it was a contradiction in terms. The whole, and every part was laid, to have been done with sedition and malice, which is guilt: therefore nothing but an acquittal could clear *Beare* from all guilt; and that the word *only* must be understood to import, that the Jury found him guilty solely of that part of the indictment, which charged him with writing and collecting, seditiously and maliciously. But this, I say, is entrapping by words; and the same sort of logic would prove, if I sat down to a dish of boiled rabbits, smothered with onions, and eat of the rabbit, that therefore I must have eat of the onions: whereas it would only be probable, and not certain: and, in matters of criminal law, where you are to proceed to punishment, you can go upon nothing but certainty. Probability may be a good ground for accusation and bringing to trial, but is a very bad one
after

after verdict, for fine and imprisonment. And if any Judge were to be of opinion, that a man could not be innocent who was found guilty of any thing by a Jury; it would behove him to know from them what they meant by the word *guilty*, and whether they really meant any more by it, than finding the defendant to have done the simple act charged. He ought, at least, in such a disputable matter, to inform them how he, and a court of law, must construe such a verdict, forewarn them of the legal consequence, and directly tell them that there was no such thing in criminal law, as the finding of any fact charged, and finding it free from guilt; and if they meant the latter, they must wholly acquit the defendant, and not find him guilty at all. But the finding of the Jury, *unless at the time of bringing it in*, it be so explained to them, must clearly be taken, according to their own vulgar acceptation of the terms as lay-persons, and not in the artificial sense of lawyers and cunning pleaders.

I will not suppose, on the contrary, that any Judge would try to inveigle a Jury into giving such a verdict, by telling them, that the naked fact of writing and collecting (or printing and publishing, as the case may happen) was all that was before them. And yet, without some such instruction, it is difficult to conceive how any Jury should, of their own heads, ever think of finding such a verdict. Such a proceeding seems to imply their having been sophisticated by some discourse,
which

which they did not thoroughly understand. It is not the natural effect of common-sense. And I cannot say I much like a Judge, who is for ever dealing in nice discourse with Juries.—“ If thou’rt honest, thou’rt a devilish “ cheat.” It is certain, that under such instruction, my Lord Holt’s law officer or student must be found guilty, and as certain, that if he were, the court of King’s Bench could not afterwards relieve him. That court could have no means of getting at the fact; it could not go out of the proceedings and the record, but must judge upon the indictment, the plea, and the finding of the Jury. Every step, therefore, taken in such matters, proves the falsity and absurdity of the position.

I cannot help wondering, how the zeal of a Whig should so far operate upon the stern virtue and liberal mind of my Lord *Holt*, as to make him thus quirk away the genuine consequences of his own legal tenets, for the poor purpose of wreaking party-resentment upon a contemptible individual. How evidently was he transported, beyond the line of sober judgment, may be seen from his urging in the case, that “ tho’ the writer or collector should never publish or intend to publish the writings questioned, yet his having them in his custody, was highly *criminal*, for, notwithstanding he may design to keep them private, after his death, they *might* fall into such hands as *might* be injurious to government.” And, therefore, forsooth, one must

must infer, that the defendant ought to be found guilty of, and punished for a crime or injury as already committed, altho' it was agreed not to have been committed, and that he, perhaps, never intended to commit it; merely because it *might*, one day or other, hereafter, be committed by somebody else.

Suppose this argument were applied to a gun or pistol, which I had in my house, or in my hand upon the high-road. It was a dangerous weapon in itself, it might be employed to rob with, perhaps I did not intend to make that use of it, but I might, and, if I did not, somebody else, when I was dead, might; and robbery on the highway was a great crime, &c. &c. But, I will not animadvert upon so miserable a ground for the punishment of any fellow-creature. To call such a determination law or sense, would be doing an injury to both. The poverty of human language is such, that it does not produce any expression sufficiently demeaning, to give the proper name or epithet to so pitiful a degradation of the talent of rationality. (And perhaps it will not be the least reproach to the liberality of the present times, that such a case should be called forth into light, from obscurity and oblivion, to be made a precedent for any judgment to be given, either now or hereafter.) But thus it always is, and will be, when a Judge hath an eye to politics upon the bench. He assumes the legislator, and makes law instead of expounding it. He pronounces a judgment inconsistent

sistent with legal premises he himself has been laying down. In inflicting punishments, he reasons from what may be, to what is; not on a crime, but on a tendency towards one; grounds himself as a criminal magistrate, upon suppositions too distant to be admitted in the logical disputations of a novice at college. He invades the province of the Jury, by taking what is matter of fact from their judgment into his own, and puts besides, his artificial construction upon their simple verdict, to warrant what he has done. And this he calls doing justice in a trial by Jury, according to the English constitution.

Perhaps some friend to the argument of Lord C. J. Holt might tell me, I had misrepresented it, because I had supposed him speaking of the simple act of hand-writing in the abstract, whereas he had spoken of the act of writing or transcribing *a libel* in the abstract. Were this to be said, I should tell the friend to his Lordship's argument, that there was no such thing as a libel in the abstract, because a libel is the defamation of the state, or some particular person. The essence of it is, its affecting somebody or individual. It cannot exist independent of time, place, person, and circumstance. Now, the consideration of a thing in the abstract, is considering it independently of all these. But the doing this by a libel, destroys its existence. For which reason his Lordship, according to his friend's interpretation, must have talked nonsense in hard words.

Let us now ask, in the language of a celebrated personage before alluded to, what common-sense would say? I think it would be something like this. Writing in the abstract must be innocent, for it is no more than couching lines, figures, and letters upon paper. It must then, and can only be the matter, sense, and application (or intention) which can render any matter criminal. Consequently, to make a person guilty of a crime by writing, it must be made appear, that the writing in itself contains defamatory matter of some particular person, or of the government, and that the writer knew the meaning thereof, and had a wicked intention, by originally writing or copying, and publishing it. Were this not so, a native idiot, or a foreigner, ignorant of the language, an officer of justice transcribing for a tribunal, or a student for his professional use, would be guilty of a crime by so doing. But this would be both absurd and unjust, and of course not law. Therefore, in the general, the act of writing is to be presumed harmless, and to shew it otherwise, you must prove a special case, some bad intent by such writing. Mere arraignment or accusation (whether in the shape of indictment, information, or action) does not, for this reason, put a man upon his defence, until some legal proof be produced in support of such accusation. For every man is deemed to be innocent, until he is shewn to be otherwise. And it is, agreeably to this maxim, that the law

law directs every thing dubious or ambiguous shall be construed most favourably for the accused.

In all criminal prosecutions, it is agreed, there are two considerations for the Jury, which are, whether the fact charged was done, and, if it were *quo animo*; if it should appear, after weighing all circumstances, that notwithstanding the fact had been committed, it was without any wicked intent, the Jurors ought to find accordingly, or to acquit. If a man be indicted for murder, and it appears, that tho' he killed the person mentioned in the indictment, he did it by accident, without malice, the Jury ought to bring it in manslaughter or chance-medley, or *se defendendo*, or to find the prisoner not guilty. So, where a man is prosecuted for a libel, and not at liberty to plead any thing in justification, if the Jury are convinced, that altho' he wrote, or printed and published it, he did so, without any traitorous, seditious, scandalous, or malicious intent, they ought either to find him generally not guilty; or otherwise guilty of the simple fact, (of writing, or of writing and publication, or of both) and not guilty as to the rest; or, if they leave out these last words, of the simple act *only*.

The matter of libel, independent of the statutes *de scandalis magnatum*, was scarcely heard of in this island, until the time of *Coke*; and the short case of *Lamb*, by him reported, states the law as resolved upon this head, in the reign of a Stuart, by the severest of all

courts, the Star-chamber, the fountain of this sort of prosecution. And yet this dreadful court, upon solemn argument, rules, “ that every one who shall be convicted, either ought to be a contriver of the libel, or a procurer of the contriving of it, or a malicious publisher of it, knowing it to be a libel. If he writes a copy of it, and does not publish it to others, it is no publication of the libel; for every one who shall be convicted, ought to be a contriver, procurer, or publisher of it, knowing it to be a libel. But it is great evidence that he published it, when he, knowing it to be a libel, writes a copy of it; unless afterwards he can prove, that he delivered it to a magistrate to examine it; for then the act subsequent explains his intention precedent.” This case of *Lamb* is the last upon the subject in my Lord *Coke*; it was determined in the 8th year of James the First, taken by his Lordship, when Chief Justice, and one of the court of Star-chamber, and afterwards reported by himself. It comes, therefore, with all possible certainty to us, from the most accurate and consummate lawyer that this country hath ever bred, and it is the report of his own deliberate judgment, which therefore he cannot be supposed to be mistaken about. In the preface to this part of his Reports, he says, “ it has been his chief care and labour for advancement of truth) that the matter might be justly and faithfully related, no reason or
argu-

“ argument made on either side willingly
 “ impaired, and that such only as (in his opi-
 “ nion) should hereafter be leading cases for
 “ the public quiet, might be imprinted and
 “ published.” The case in question too, as
 reported by *Coke*, hath, from his time to the
 present, been always understood to be the
 very code of libel-law ; nevertheless, as it
 did not go far enough for Lord C. J. *Holt*, and
 would not warrant the determination which
 he was bent upon coming to, his Lordship
 denied the accuracy of the report, and said,
 that *Moore* must be right in his representa-
 tion of the matter, and that “ *Coke* ought to
 “ be expounded by *Moore*, where the writer
 “ of a libel is deemed in law to be the con-
 “ triver ; and then *Coke* might be admitted
 “ to be law, otherwise not ; for, in the case
 “ in *Coke*, the question was of the publica-
 “ tion of a libel ; and it was held, that the
 “ writing of a copy of a libel was not a pub-
 “ lication, but only evidence of it ; but no
 “ question was made, if he was a libeller ;
 “ and for the matter of publication, the
 “ having of a libel is not a publication. If
 “ a libel be publicly known to be published,
 “ the having of a copy is evidence of a pub-
 “ lication ; but *contra*, where it is not known
 “ to be published *.” This *Moore* was, at
 the time, a practising Serjeant at Law, and
 never

* K. against *Beare* in Lord *Raymond*, who seems to have
 best put together what fell from the bench, altho' the 12th
Modern has done it very well ; but *Carthew* hath stated the
 indictment and postea the most completely.

never rose higher, and, one would conceive, could not know the sense of the court, and the C. J.'s sentiments better than his Lordship himself did. However, I will state the Serjeant's report literally, and then leave it to the reader's judgment, whether it really and materially varies from Lord *Coke*. The Serjeant's report runs thus: "Several questions
 " arose about who shall be called publishers,
 " and what shall be called publishing of a
 " libel. And it was resolved, that the pro-
 " curer, and also the writer, are both con-
 " trivers, that the procurer of another to
 " publish the libel, and the publisher him-
 " self are both publishers, that the reading
 " of the libel, nowise knowing it to be a li-
 " bel, is not publishing; that he who writes
 " the copy of a libel, by the command of
 " his master, or his father, is not a pub-
 " lisher; and that he who lends a libel to
 " be copied, and he who repeats the libel,
 " or any part of it, knowing it to be a libel,
 " is a publisher; and so, if one write the
 " copy by the command of his master or his
 " father, and carry it to another, he is a
 " publisher; for *Coke* said, *nec domino nec*
 " *patri in illicitis obediendum est*. Note also
 " in this case, a woman was accused of be-
 " ing a publisher of this libel. And because
 " she did not know, by reason of the infir-
 " mities of her sex, whether it was any of-
 " fence or not to speak of the said libel, she
 " was admonished without censure, for *Coke*,
 " Chief Justice of the Common-Pleas, said,
 " that

“ that *fæminæ sunt imbelles & sine felle*. And
 “ he said, *fæmina si nescit, clericus miles &*
 “ *cultor, parcat ei judex & ultor*. The Lord
 “ Chancellor said, *inveniens libellum famo-*
 “ *sum & corumpens punitur.*”

Now, would not any man, from the expression of Holt, suppose that *Moore* had represented the Court to have determined the mere writer or transcriber, to be the contriver of a libel, whereas the word *writer*, as used by him, and coupled with *contriver*, means evidently the composer, and is the same with *Coke's* contriver, that is, the person procured by the original devisor or thinker of the subject, to contrive and compose some writing thereon. Lord *Coke* denominates contriver, and procurer of the contriving, those whom *Moore* calls writer, and procurer of the writing, as is plain, from the latter's immediately adding, they were both contrivers. In short, the sense and meaning are precisely the same, tho' taken down and expressed in different words. The suggestor of the writing of a libel, and the writer, the procurer of the contriving, and the contriver, are the same in the eye of the law, they are both contrivers. And the whole strain of *Moore's* report, agreeably to *Coke's*, evinces, that the Court, in this determination, never thought of considering any body as a libeller, or as publisher of a libel, who did not know the purport and drift of the composition or writing. Notwithstanding *Holt's* taking notice, that
 “ the question before the Court, was not
 con-

concerning writing or making, but about the publication of a libel, - and that the writing the copy of a libel, was merely mentioned to that point, and that no question was made, how far such writing a copy is criminal, and makes a libeller ; and his Lordship's insinuating from thence, that it was improper and unlikely for the Star-chamber Judges, to say a word about any thing but publication ;" yet, it is certain, that both reporters concur in making them speak about the contrivers of a libel, and that my Lord *Holt* himself cites *Moore's* report of this very case, to prove the writer of the copy of a libel to be a contriver. What unfairness, what inconsistency ! There is but one way of accounting for this, which is, that K. William's Chief Justice, was resolved to punish his libeller at any rate, and yet, as the verdict stood, there were difficulties in finding out legal ground for the purpose, which reduced his Lordship to the necessity of using much metaphysical alchemy, to change the nature and meaning of words. There was no authority for him. On the contrary, there was the great ruling case of *Lamb* directly against him, from the clear, determinate report of my Lord Chief Justice *Coke*, one of the Judges in the cause, and the very oracle of Law. But, when a man is once in for it, he must go through, and to this end, he disputed the accuracy of *Coke*, and set up Serjeant *Moore's*, whose account, nevertheless, when looked into and considered, appears to be the same, although less perspicuously

cuously delivered. What is remarkable too is, that in Lord *Coke's* very short report, he has twice given the determination in question, in the same words, so that, if mistaken at all, it was twice mistaken by him. This is rather too much to suppose, especially as it has no other support than the construing of a word in *Moore*, capable of two senses, into that which is most inconsistent with the rest of his report, and is absolutely incompatible with the positive expression of *Coke*; which same Lord *Coke*, from the report of *Moore*, appears to have been the Judge of the most weight at the board, and is almost the only one particularly noticed by him. He cites his Lordship for excusing a woman, because *fœminæ sunt imbelles & sine felle*, (women are but weak in understanding, and without gall) and again, *fœmina, si nescit, clericus, miles, & cultor, parcat ei judex*, (a woman, if she is ignorant, clerk, soldier, and husbandman—let the Judge spare them.) The whole Court, according to both reports, agreed in declaring, that the reading of a libel to another, not knowing it to be a libel, is no publication; and that the writer of a copy, by order of a master or father, is not a publisher, unless he carry such copy to another. From whence, it is plain, that my Lord *Coke* thought, nobody ignorant of the purport should be punished as a publisher; for the whole fair sex, the clerk, the soldier, and the husbandman (that is, in other words, all mankind, the church, the

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gentry,

gentry, and the labourer) are to be excused, if ignorant, by the Judge. *Moore* makes the Lord Chancellor close all, with saying, *inveniens libellum famosum punitur*, (the inventor of an infamous libel is the person punished.) Is it therefore possible to conceive, that such a Court could pronounce a person, who made a copy, without any ill intent, guilty of contriving a libel? No man that reads *Moore*, and attends to the sense of the word *writer*, as used by him, can doubt of his intending by it the composer. How can a mere copier be a contriver? which he affirms, however, of such a writer as he mentions. In short, my Lord *Coke* gives evidently the true sense of the Court. And it has happened in this, as in most other cases, that a note-taker, who gives the sense of what the Court says, and attends to that solely, is more to be depended upon than one who aims at taking every word, and minds nothing else. A short-hand writer is scarcely ever correct in the sense; for, if he does not hear, or should slip any one word, he has no clue to go by; and, it is scarcely conceiveable, in a large auditory, that a word here and there should not be lost in coming from the bench to the bar. Besides, what is so agreeable to good sense, and the nature of justice, as for Judges to deliver themselves in the manner represented by my Lord *Coke*, and to reason from analogy? The judgment, as given by him, seems to be this: "No person that is intentionally innocent ought to be con-

convicted in a criminal Court. In this very matter of libel, nobody, who has not some hand in the contrivance of a libel, is deemed to be a writer of it; he must be either the procurer of its being written, or the person procured to write it. So, with respect to the publication, it must be done *cum felle*, maliciously, by somebody who knew, that in propagating such a paper or story, he was propagating a libel; it is the intention which characterises the act: therefore, if a man simply make a copy, (or, in Lord Coke's own words, write a copy) and do not publish it to others, the writing of such copy is no publication. However, if one knowing it to be a libel, writes a copy of it, it is strong evidence to induce a Court to believe that he published it, and will put him upon explaining his intention thereby. In short, to sum up all, *every one who shall be convicted, ought to be contriver, procurer, or publisher of it, knowing it to be a libel.*" This is a fair, plain representation of *Lamb's* case, which shews it to afford no ground for the determination in the case of *Beare*; but on the contrary, to condemn it. Indeed, this last is totally unsupported by precedent, principle of law or reason. It clashes with them all, and goes a length that the Star-chamber was ashamed of, and disclaimed. Nay, it is inconsistent with itself; and it is a single case.

In human judicatures, it is impossible to ascertain precisely the mind and intention of

any actor, unless he has himself declared them, and proof be given of such declaration, but they are to be collected from circumstances before and after, which must be judged of at his trial. There can be no malice, where there is ignorance. For instance, if a raw lad, brought to town as clerk to an attorney, was bid by his master to transcribe such a paper, and carry it to such a person, and this paper were to contain an account of the D. of Grafton or Mr. Bradshaw, having entered into a treaty for the sale of such a place under government with such a person, by the intervention of such a woman, and sold it for so many thousand pounds, of which such a portion went to the Duke, and such a one to his Secretary; and this raw clerk had never, in his life, heard before of the Duke or Mr. Bradshaw, and did not know whether the sale of such an office was, or was not usual or improper, and corrupt, or what a libel was, nor consequently, whether the relation of such a story was a libel or not: would it, if the lad were prosecuted as a libeller, and this seemed to be the case, be possible for any Judge to persuade me, that I ought to find him guilty of writing a malicious libel, by telling me malicious was a word of course; or, would it be possible for such Judge, with all his brethren, to persuade me, that it was a question of law, whether this act of writing was done maliciously or not; or that they could judge of it better than myself or a Jury; or induce me to believe,

lieve, that such writer had made a libel, because writing was making, &c. Common sense revolts at the very idea of such stuff. And I am satisfied, that the noble Duke, or his Secretary, who have both been so often, so impudently, and so falsely misrepresented in public and private life, would scorn to uphold such impositions upon the common understandings of mankind. The famous Scotch logical hero, Duns Scotus himself, surnamed *Doctor Subtilis*, would have shrunk from such work. Then, what will Lord *Mansfield* say to it?

It has often been matter of astonishment with me, how a notion could ever obtain, that whether any paper was a libel or not, was a matter of law, and was therefore, of necessity, to be left to the determination of the Judges. Almost every opinion has some little foundation for it, and, I think, the present must have arisen from the Judges having formerly determined the matter. But it could not then be otherwise; because the prosecutions for state-libels, were always carried on in the Star-chamber, where there was no Jury. And, it is self-conviction to myself, that this gave rise to so strange a conceit. In many cases, much evidence must be entered into for explaining a libel, and bringing it home to a particular person; it must be shewn, that he went among his acquaintance by such a name, although not his own; that he used such a house, diversion, dress, &c. called such a person by such a
nick-

name, and was remarkable for such and such things. If these particulars are not proved, by *viva voce* evidence, they must be by affidavits or depositions, before the Court can determine, whether the paper, print, &c. were a libel or not. Where the Judges proceed without a Jury, such evidence must be laid before them; but, where a Jury is called in, it is their province to determine, whether such a particular person be intended, and whether what is said of him be scandalous, malicious, &c. that is, in other words, whether the publication be a libel; for, there is no magical virtue in the term libel, nor any other law in the matter, than what lies in that single word. It is impossible to contend, that in all cases, without evidence of other facts, besides that of publication, any Court can pronounce the thing complained of to be a libel. This, therefore, proves the falsity of the assertion, that nothing more is the subject-matter of trial.

Nothing can be more contemptible than the saying of Lord Holt, that the writing makes the essence of a libel. It is clearly the malicious, or seditious intention of it, which is the essence of the offence. As in felony there must be *felleus animus*, so in libels there must be a libellous mind. Nay, the tender laws of England will not suffer a man to be called in question before a court of vindictive or criminal justice, for words merely spoken, although reflecting and defamatory, because they may be spoken in
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the hurry of altercation, in sudden passion and anger. The Courts expect that it shall appear that there was real rancor and a deliberate intention to defame, and therefore require, before they will take notice of almost any words, that they shall be committed to paper, which is presumed to be a solemn act, and what ought to render the doer accountable. This is what gave occasion to wicked men, to pretend that the whole essence of a libel consisted in the writing. Whereas, if this were so in a strict sense, then all writing whatever would be criminal ; but this is too much to contend. It is therefore restrained to the writing of libellous matter. Now, for what reason is this ? Because there must be malice in a thing to make it a libel. But, it does not follow, from there being malice in a writing, that there must be some in the writer, unless he were the composer or contriver of such writing. Then, if this does not follow of necessity, there must be some proof to induce a belief, that the writer (or printer, if you will) knew the meaning of the writing which he was transcribing, or printing, and must, therefore have done it with a libellous intention. But, you may reply, that the mere writing, copying, or printing, is a proof of such intention. I allow, that it is *prima facie* evidence, presumptive proof, and may be urged as such to a Jury, for consideration. Indeed, it will probably make it not only prudent, but absolutely requisite, for

for the writer or printer, to enter into a defence. To shew for example his extreme youth, an ignorance of the drift of the writing, that he did it secretly in his own study, from whence, though locked up in his bureau, it had been stolen, and published without his knowledge; and that he had frequently expressed much concern and resentment about it: or, that he wrote it as a law student, or ingrossed it for the clerk of indictments; or was a foreigner, and neither understood, nor ever heard, what the purport of the writing was, &c. &c. It may be said, that a public prosecution would never be carried on against such a transcriber. What, not if it answered the purpose of any political faction, to oppress him, upon a difference of parties? I can tell you, that in such case, a nobleman, a secretary of state, would stir in it himself. How came the world to know any thing of the abandoned blasphemy in the *Essay on Woman*? Was it from the complainer of the work, or the author? Did they differ in private principles of virtue, or in party only? Was it a desire of extinguishing and suppressing blasphemy itself, or of ruining a troublesome man? Was there, or could there be, the least motive from private or public virtue for the whole proceeding? In short, what would disgrace a man, as a gentleman, for ever, and make one shy of any intercourse with him, will be, as a politician, praiseworthy, a proof of good capacity, and an admirable

admirable feat. There are many instances of malicious prosecutions, both on the score of gratifying private animosities, and of carrying political purposes. The real intention, therefore, of any writer, whether author, or transcriber, should be ascertained to the Jury, before they find him guilty of the charge laid upon him. With respect to libels, in moderate times, the man proved to be the printer and publisher, would find it very difficult to shield himself from being convicted of having printed and published with a libellous intention, that is, of being found generally guilty. He would probably be so, the presumptive evidence being strong against him. In warm times, like those in London towards the end of Charles the Second's reign, or in the present, it is possible that a printer of the wickedest, falsest, and most mischievous libels, upon the Prince and the very frame of our government, whether under the signature of Junius or any other, might be acquitted. There are seasons of epidemical madness, when a temperate Jury cannot be had, and when nothing will be deemed a libel upon government. Be it so. The disorder cannot last long. At this moment, perhaps, Mr. Geo. Bellas, the boat-failing proctor ; Mr. Arthur Beardmore, the *magna charta* attorney ; Mr. Humphry Cotes, the bankrupt ; Mr. Horne, the *Brentford* curate ; Mr. Vaughan, the broker, &c. taking upon themselves the style and title of supporters of the rights of all Englishmen,

may have some privilege beyond us common men. But these extraordinary powers are not delegated for any certain period, and are held merely at the will and pleasure of the people, and resolvable in an instant by their majesty. The vortex too, in general, extends no farther than the bills of mortality, and perhaps does not take in scandal between man and man, but only between the crown and the public. A late event in a bordering county, may induce one at least to think so, where a placeman and a courtier, through the medium of a Jury, has given a very smart check indeed to the outrageous, indecent, unprofessional pertness and calumny of a zealous young man, who might have found a more suitable employment for his talents, than the being public orator to factious, popular meetings. The moral of the whole may be very good. But be the respective impartiality of Judge and Jury what it will, and it may sometimes be a question on which side it lies, the constitution has placed the trial of *all* criminal matters, in the hands of the latter most indisputably, and they are upon oath to find, whether the act complained of was done, and whether wilfully or not. There is scarcely any matter of challenge allowed to the Judge, but several to the Jurors, and many of them may be removed without any reason alleged. This seems to promise as much impartiality as human nature will admit, and absolute perfection is not attainable,

ble, I am afraid, either in Judge or Jury, or any thing else. The trial by *our country* is in my own opinion the great bulwark of freedom, and, for certain, the admiration of all foreign writers and nations. The last writer of any distinguished note upon the principles of government, the celebrated Montesquieu, is in raptures with this peculiar perfection in the English policy. From Juries running riot, if I may say so, and acting wildly at particular seasons, I cannot conclude, like some Scottish doctors of our law and constitution, that their power should be lessened. This would, to use the words of the wise, learned, and intrepid Lord Chief Justice Vaughan, be “ a strange, new-fangled conclusion, after a trial so celebrated for many hundreds of years.” Whether *London* Juries will, or will not judge impartially in factious times, I cannot tell ; but this I am sure of, that they are as capable of judging, whether any paper brought before them be published with a libellous intent, as my Lord Chief Justice Mansfield, and his assessors (able and learned as they are) there being no legal matter whatever in the consideration.

A libeller is charged with printing and publishing such a paper, with such blanks, meaning thereby, certain persons there described, with an intent to defame, raise sedition, &c. It is said, the publication and the application of the blanks, are the only facts in question, and that these therefore

are alone to be submitted to the Jury, for the nature and import of the expressions in the paper, whether criminal or innocent, are a matter of law. Should one ask, however, whether any particular words were necessary to make a libel, no, must be the answer. By the knowledge of what law then is the inference to be made, whether the writing published be a libel or not? Is it by the law of estates in fee simple or fee tail, or of personal estates; or is it by the law of contingent remainders and devises, of limitations, purchase, grant, or of deodands, waifs and estrays, or by the rules of special pleading? No; it is merely of the intention of the party, or at most, whether the writing he has put forth contains insult, defamation and scandal, or tends to raise sedition. Is this all, and is no set of words necessary, or a *sine qua non*? This is the whole. Why really if it be, I should think a Jury of common coffee-house politicians in London, could guess as shrewdly, or tell as certainly, to what every expression alluded, and whether it raised a horror, contempt, or ridicule, or else vented lies of the administration, state, or any individual, or disposed people to clamour and be seditious, as Mr. Justice *Gould*, or my Lord Chief Baron, even if they could call up to their assistance the deceased Mr. Justice *Dennison* from the dead, that skilful special pleader. If the words are written or printed, and published with a malicious or seditious intent,

tent, they are a libel. This is the term which the lawyers have pitched upon to denominate such a writing, and when this term is once thus explained, the whole law necessary for forming a determination whether any writing be a libel or not, is known. It is therefore, the actual use and application of the words, which are to be judged of. For what reason then, is not a Jury able to make the proper inference, after hearing all the circumstances of the writing and publication, considering the text and context, and all the constructions to be suggested *pro* and *con*? Any words almost may be used to convey a libel; there are no technical or particular words appropriated to the purpose: nor is there any peculiar form of sentence requisite. A man may render the same words libellous or not, by the application he gives them, whether direct, ironical, or burlesque, in jest, or in earnest. The subject is generally political, not legal, and a Jury, particularly a Special Jury, can collect the drift of the writer or publisher, as well as the ablest civilian or common lawyer in the land. In many instances, if he be a man of the world, much better. The Houses of Parliament have even taken upon them to do this. In short, the intention is the whole and sole matter for consideration; the particular words are of no consequence. For, cowardice may be attributed to a general, servility to a nobleman,

and

and knavery to an ingenious youth, and be no libel ; as for example.

“ Cobham’s a coward, Marchmont is a slave,

“ And Lyttelton a dark designing knave.”

A picture or drawing may be a libel, like many we have been favoured with of late days ; perhaps stone or wood may be wrought into one ; and, most certainly, Foote’s pantomimes and mimickries may be deemed so. There is no peculiar legal import, that I know of, in libellous expressions, which requires the operose skill of a conveyancer, draughtsman, or pleader, to settle. But, if there was any matter of law in the consideration, it can only be, whether such words, if proved and shewn to be written maliciously, are of so infamous or hurtful a dye, as to be at all regarded by a Court of Justice. This, however, in an information granted by the Court of King’s Bench, (the only one that should be tolerated) is predetermined by their letting it go to trial. If the proceeding be by indictment or information of the Attorney-General, any counsel may object to their not lying for such publication, either before or after the Jury are called, or after trial, if conviction ensue, in arrest of judgment. But this affords no pretence for saying, that the inference of maliciousness or seditiousness in the publication, is a matter of law, and to be left as such to the Court.

The

The only thing that has astonished me is, how lawyers could have the impudence to make such a pretence, and the world the folly to bear with the mummary of it. Whoever publishes, with a design to villify any individual, or the government, is a libeller; but to the investigation, discernment and inference of this, the Jury, aided by council and witnesses, are as competent as the Judge; and it can only be satisfactorily made out from evidence in many cases; and in all is, what the Jury, that is, the defendant's country, can and should decide upon. If the language be French, Spanish, or German, or there are signs in the picture which are not obvious, both Judge and Jury will probably require help. In reality, the intention with which a man has published, or made any thing, is a fact, as much as whether he thought of his mistress yesterday, or trod upon his rival's toes by accident, or with a design to affront him; there is, there can be no law in it: nor, of course, is there any reason why a lawyer should make the due inference as to such design, thought or intention, better than than a layman. Whether such a principle, or such an idea, was in such a man's head or heart at such a time past, is as much a fact, as whether there was such a mole, wen, or cut in his forehead; and there is nothing but plain, good sense, needful for his judging from the discourse, company, friends, connection, interest, quarrels, pique and temper of the defendant, taken together, with
the,

the common import of the words themselves, whether the writer published or not with a libellous intent.

Don't we all know, that in actions for words, which go upon the same principle, where some words are held to be actionable in themselves, and others are not so, unless accompanied with special damage, even the words, actionable in themselves, may be shewn to have been spoken in fun and humour, and so to have been understood, and not according to their common import, and that evidence of this sort is constantly laid before Juries, and that they acquit in such case, notwithstanding the words were actually spoken ?

My Lord *Vaughan* in *Buskel's* case, says,
 “ A Juryman swears to what he can infer
 “ and conclude from the testimony of wit-
 “ nesses, by the act and force of his under-
 “ standing, to be the fact inquired after.
 “ Without a fact agreed, it is as impossible
 “ for a Judge, or any other, to know the
 “ law relating to that fact, or direct con-
 “ cerning it, as to know an accident that
 “ has no subject. Hence it follows, that
 “ the Judge cannot direct what the law is
 “ in any matter controverted, without first
 “ knowing the fact. A Jury cannot impli-
 “ citly give a verdict by the authority and
 “ dictates of another man. One cannot
 “ see by another's eye, nor hear by another's
 “ ear ; no more can a man conclude, or in-
 “ fer the thing to be resolved by another's
 “ under-

“ understanding or reasoning ; and though
 “ the verdict be right the Jury give, yet
 “ they being not assured it is so from their
 “ own understanding, are forsworn, at least
 “ *in foro conscientiae*.” And how certainly in
 matter of libel, the intention of the presu-
 med libeller is supposed to be inferred by the
 Jury, may be seen from the form of drawing
 up the verdict on such occasions, or by look-
 ing into that golden treatise on the duty of
 Petty Juries, written by Sir *John Hawles*,
 formerly Solicitor General, and an excellent
 lawyer, called *The Englishman's Right*, which
 the perspicuity of the writing, and the found-
 nefs of the reasoning render inestimable. The
 reader will there find, that in libel, trespass,
 breach of the peace, and felony, on the is-
 sue of not guilty, the law arises out of, is
 complicated with, and influences the fact,
 and must therefore be determined by the Ju-
 ry. But indeed. the variety of findings in
 murder before-mentioned, prove this unde-
 niably. Not only the fact, but the intention
 of killing, must be proved, of both which
 the Jury are the sole judges ; and if they find
 it was not done premeditately, and of fore-
 thought, it is but man-slaughter. So if the
 indictment be for an assault, with an intent
 to kill, or to ravish, &c. the Jurors must
 collect, infer, and judge of the intent. In
 the *King against Crook*, the defendant was
 indicted for forging a deed with an intent to
 molest and disturb one *Garbot*, in the pos-
 session of his freehold, contraay to the sta-

tute. The Jury found the defendant guilty, and he moved in arrest of judgment, which occasioned several arguments at the bar in different terms ; and at last, after having taken time to consider, the Court gave judgment against the defendant. Lord *Raymond* said, “ It is objected, that the Jury cannot
 “ determine the intent, but this is not the
 “ case of a deed or a will ; and what is or
 “ is not an intent to do a thing, within the
 “ meaning of an act of parliament, is fit for
 “ their determination, because such intent
 “ is to be collected from fact and circum-
 “ stances, of which they are the proper
 “ judges.” Mr. Justice *Page* said, “ *the*
 “ *intent is matter of fact*, to be tried by a
 “ Jury. It is like the case of an indictment
 “ for burglary, laying, that a house was
 “ broke with an intent to steal ; such intent
 “ is left to the Jury. *Probyn J.* (since Lord
 “ Chief Baron) and *Lee J.* (since Lord Chief
 “ Justice) were of the same opinion.”

When I reflect that the declaration, information, or indictment for a libel, charges the paper complained of with malice and sedition, that the Jury are sworn well and truly to try this charge, and true deliverance make, that the defendant, by the forms of law, cannot plead the truth, or any matter whatever in justification, and that if the Jury find him guilty, the verdict is drawn up ;
 “ The Jurors say upon their oaths, that the
 “ defendant maliciously and seditiously pub-
 “ lished the paper in question ;” it is impos-
 sible

fible for me not to declare, that the whole
 of the proceeding, and the only legal form
 of drawing up both information and verdict,
 give the lie to those who tell a Jury that “ the
 “ epithets false, scandalous, and malicious,
 “ are at present (before any verdict finding
 “ the defendant guilty, which establishes the
 “ fact) all words of course ; but if the wri-
 “ ting be found a libel, they are inferences
 “ of law,” or else that “ the epithets of ma-
 “ licious and seditious, are inferences in law
 “ with which they have nothing to do, and
 “ that whether the paper be criminal or in-
 “ nocent, is to them a subject of indiffe-
 “ rence.” Indeed, if “ nothing can be more
 “ various than the *manner* of publication,
 “ which may be attended with the highest
 “ degree of guilt, or with circumstances
 “ that make it a venial matter ;” how can
 it be said in the same breath, that the only
 “ question for the Jury’s determination is,
 “ whether the defendant printed and pub-
 “ lished a paper of such tenor and meaning
 “ as is charged by the information ?” Is not
 the manner of the publication, if capable of
 such variation as to be either criminal in the
 highest degree, or perfectly venial, of great
 importance ? Is it not intirely a subject of
 evidence and matter of fact ? and if it turn
 out venial, ought not the Jury to acquit,
 and true deliverance make ? Because the
 Court can arrest judgment, *must*, or should
 the Jury, in honour and conscience, trust to
 the Court’s doing so ? But if they should,

can the Court itself, by any other means than the Jury, come at a knowledge of the manner of publication? And is not this knowledge absolutely necessary to the doing of justice? Will a very just observation of a puny Justice (which I read lately in a magazine) that “there is not a law-term more ambiguous than *criminality*,” dispose me the more to leave the construction of it to the Court? But, be this as it may, I am sure if it be true, as above rehearsed, that “before the finding of the Jury which establishes the fact, the epithets *malicious*, &c. are words of course; but that if the writing be found a libel, they are inferences of law,” it would be with me an additional argument (were I of the Jury) to be thoroughly satisfied that the paper was a libel before I found such a verdict. The wording of this sentence is not very clear, but if I understand aright, the paper’s being malicious, or not, depends upon my verdict; *malicious*, *seditious*, &c. have no meaning at all, until I pronounce the defendant guilty, and that instant they leap out of their trance, take the lead, and are the most operative of all. They turn the defendant, whom I left innocent, into a devil at once.

No Jury of laymen, I suppose, would immediately discover the justice or propriety of such proceeding; nor would it enlighten their minds very much, were they to be additionally told, that “by finding the defendant guilty of the fact, they do not find he did
“ it

“ it with any degree of malice or guilt, more
 “ than appears from the face of the *publica-*
 “ *tion.*” Should they, however, have the
 curiosity to look at the verdict when drawn
 up, they would, I believe, be of opinion,
 that this last speech ought to conclude with
 the word *information*, to make it true.

For my own particular, I must profess,
 that when I heard it said, that the Jury, by
 finding the defendant guilty of the informa-
 tion, “ do not, by that verdict, find whether
 “ ther the production was legal or illegal,”
 I am at some loss to tell what those words
 import. Is it, that I am at liberty to find a
 man guilty, under a criminal proceeding, of
 what is legal? Surely this cannot be! If the
 law is to arise out of the fact, the Judge
 should instruct me, that if the fact turns out
 in such a way, it is legal, if otherwise, ille-
 gal, and that I must find accordingly. It
 would strike me, as an absurdity, to be told,
 in trying a man for a crime, and as a criminal,
 that whether what he did was criminal
 or innocent, legal or illegal, it was all one
 to me, and my verdict ought not to be influ-
 enced by any such considerations. This can
 only be supported by the nonsense of calling
 abuse upon an individual, or upon govern-
 ment, a matter of law, instead of a matter
 of fact, or the sense of malice or sedition, the
 sense of a lawyer, and not of a layman, which
 is the consummation of all absurdity, confu-
 sion, and jargon. But, should any man of
 the long robe, nevertheless persist, “ it hav-
 “ ing

“ ing been always his practice,” to denominate malice and sedition law, and the understanding of malicious and seditious writings, the understanding of matters of law, I should not, for ever, contradict him. However, should he proceed with a religious, a threatening, or a jesuitical air, or with a mixture of all, to tell me, when on a Jury, that “ if “ I chose to determine the point of law, I “ should be very sure, for my conscience “ sake, that my determination was law; and “ and that if the law was in every case to be “ determined by Juries, the country would “ be in a miserable condition.” I should be apt to answer, that in all criminal matters, where law was blended with fact, Juries, after receiving the instruction of the Judge, must determine the whole, by finding the defendant generally guilty or not guilty, and that such a complete verdict I would more especially give in matter of libel, because I took myself to be as good a judge, whether any thing was written or done maliciously or seditiously, as any lawyer whatever, and there was nothing but this to be judged of, which he may call law, but I never should. And perhaps I might subjoin, that as to the pernicious consequences of Juries, taking upon them to determine in every case what the law was, no such thing could happen, unless he and his brethren were to unite in abolishing special pleading, and of course demurrers, by making every thing triable on a general issue, and then something like it might

might happen ; and this, perhaps, was worthy some consideration before the evil had spread too far.

Supposing, however, that a Jury, finding no special verdict, should not find a general verdict in the usual phrase, guilty or not guilty, as they ought to do, but in some other words, such words must certainly be entered on the record, if the Judge accepts them. Where their meaning is dubious or incomplete, the Judge may refuse to accept them, and it must always be his fault, if any uncertain verdict be taken. It is his duty to point out to them the defect, whatever it be, and to make them explain themselves, or to send them back for further consideration. Should he perceive, that their design is to acquit the defendant of the criminality, but that their expressions will not answer their end, and be deemed, in legal sense, to find him guilty, he is bound, both in duty and conscience, to inform them so, and to let them know what would be the proper way of compassing their purpose. If corruption can be proved, they are subject to an attainr; otherwise, their own consciences must answer for it, whenever they conspire to give a verdict unjustly. They should not be permitted, in any case, to skulk under ambiguous or indirect terms, but be forced to be explicit. On the other hand, neither delicacy nor fear, much less any sinister purpose, should induce any Judge to receive words that wanted explanation, or were capable of two senses, or were improper to be put

put upon record. Deceit, indeed, in the solemn execution of justice, and of this celebrated part of the English judicature, cannot be surmised. In conversation, it is reckoned disingenuous and unfair, to put a different sense upon a man's words from what he intended; and, in the transaction of business, nothing discredits a gentleman so much as equivocation and fallacy of expression. But this, when practised by a Judge, is a perversion of right, a violation of his oath, corruption in his office, an offence against the state, and a proper ground for an address to both Houses, to remove him from the seat of judgment. Both the Judge who tries the cause, and the Court of King's-Bench, are obliged, by our constitution, to take the verdict according to the real meaning of the Jury, because it is to be their's, and not the Court's. Both are sworn to a faithful execution of their several trusts; there should be no juggle in the matter; there can be none (without a forswearing) on either part. Where the Judge, therefore, verily believes, that the Jury intended to acquit the defendant of any malice or sedition, whether his own opinion coincides with their's or not, he is bound to take and expound their verdict accordingly, and not to reason artificially, from what he may have said in summing up, or from the nature of the issue itself, according to his legal notion of it, as to what they must have said, and from thence conclude, to what they did say; as, for example, that "the Jury did
 " not

“ not mean to find the malice of the defen-
 “ dant, because it was not within their en-
 “ quiry ; nor did they mean to execute it,
 “ *because it was not within their power to ex-*
 “ *clude a legal deduction.*” Such kind of rea-
 soning, in an answer, would, as my Lord
Mansfield knows, be called in the Court of
 Chancery, fencing with the question. It is
 answering with a reference to another thing,
 on the truth and falsehood of which, its own
 must respectively depend, and therefore is
 deemed no answer at all. In the present sub-
 ject-matter, it is more especially liable to
 exception, because myself, and very many
 others, are fixed in opinion, that the malice
 is not only within, but the true object of,
 the Jury’s enquiry ; and that the inference
 of it is no more a legal, than it is a philoso-
 phical or a popular deduction. Come forth,
 therefore, and answer directly, whether you
 do or do not believe, that the Jury intended
 to exclude the malice ? yea or nay ? But—
 you know too well, how unexceptionable,
 how satisfactory a categorical declaration al-
 ways is, not to have given such a one, could
 you have given it with truth. *Dum taces,*
 therefore *clamas.*

The provinces of Judge and Jury are di-
 stinct and incompatible. And, on all pleas
 of not guilty, the Jury must determine both
 law and fact, from the nature of the thing,
 as well as by usage immemorial, that is,
 must decide whether the defendant be guilty
 or not. If nothing is found against him, or

if nothing criminal is found against him, he must be acquitted. There can be no amendment or alteration of their verdict by the Court; it can only be by themselves before being disimpanelled. My Lord Ch. J. *Hale* says, “ If the Jurors by mistake or partiality, “ give their verdict in court, yet they may “ rectify their verdict before it is recorded, “ or by advice of the Court go together again “ and consider better of it, and alter what “ they have delivered. But, if the verdict “ be recorded, they cannot retract or alter “ it.” A Jury may be bid to explain their verdict, but the proper time for this is, when they deliver their verdict, although before their discharge from that particular cause, it may at any time be done; but that period passed, the thing is impracticable ever after. In a will, the intention of the testator, and not the legal import of the words (it is now said) is to be taken. But this must hold much stronger with a verdict. Now, every amendment in phraseology, or new-wording, is an alteration, and as no Court can alter the finding, the thing in its own nature is more suspicious than new-dressing bail, which always looks like a cover for deceit. After the Jury be once discharged, nothing can be done that may affect their verdict. The substance is on all hands agreed to be sacred; and by varying the least expression, you may change the sense, and give another turn to the whole. Therefore no risque of the kind is to be run. If a verdict as brought in, has

no legal import, it should not be received ; but if from sleepiness, oscitancy, hurry, or fright, such a verdict, or one that is capable of two senses, be received, and the Jury be discharged before any explanation had, it cannot be amended afterwards by the Judge, or by the court, in order to make it what they think, from their own way of reasoning, it should have been, under a pretence of conferring upon it what they call a legal import. Where the real verdict has at first been truly taken, it cannot be amended, however defective it may be in itself. The Jurors after being disimpanelled, cannot be called, or be permitted to explain, and much less to alter, or add to the verdict which they had delivered, when impanelled. There can be nothing therefore to ascertain or amend the verdict by.

This was not attempted, or so much as dreamt of, in the violent case of *Beare*. The Judges of those days knew that as it had been received, so it must stand. No council ventured to move the Court for the purpose. So far from directing any motion for entering up the verdict according to the legal import of the words, I am convinced that Lord *Holt* was too wary and wise to have let such a thing be shewn cause upon before him. The imputation of altering verdicts, after once received by a Judge, and the Jury discharged, he would not incur ; indeed it would have been to accuse such Judge of insufficiency, and to subject himself to the odium of varying, perverting, and corrupting

verdicts, in order to serve court-purposes. The Judge would have been charged with having deceitfully and unduly received a verdict in improper and informal words, on purpose to entrap the Jury, and to afford a pretence for changing their finding afterwards; and thereby altering the sense and meaning of it. They would have recollected my Lord *Hales's* saying, " If the Judge's opinion " must rule the matter of fact, the trial by " Jury would be useless;" and they would certainly have accused the Judge of having betrayed and imposed upon the Jurors, for that he otherwise would have refused to take the verdict as given at the time, and told the reason why *Holt*, bold as he was, did not care to stand this, although he was not the Judge who tried the cause, and therefore not so directly obnoxious to complaint as he would have been, had that been the case. Besides, that verdict was drawn up in Latin, though delivered for certain in English, which would have afforded much shelter, and have begot many learned arguments to prove that the clerk could alone have been mistaken; but even this additional field for controversy would not induce the old chief to hazard the battle.

The permission to a Jury to rectify or alter their own finding, or to declare against it by affidavit, after they have once been at large, and mixed with the world, would be of the most dangerous consequence; it has rarely been asked, and ought never to be granted.

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The idea is novel, and contrary to the fundamental principles both of law and policy. But the application to Jurors, after being discharged, to hear privately, and *ex parte*, other evidence, and to make affidavits in consequence thereof, either to alter the whole or any part of their verdict, or to explain it, or to express a sorrow for having given it, is infamous, and the greatest inlet to iniquity, corruption, perjury, and injustice, that can be devised; and therefore those who make such applications, when discovered, should be prosecuted at the public expence, fined, and branded for ever. Every practice of this sort, tends to lessen the force and effect of the public judicature of the country, and counteracts the guards with which the law, for wise reasons, has beset Juries, by having them shut up immediately, after being sworn, and no person whatever admitted to speak to them, lest some popular talk, or external influence, some clandestine bias, or partial representation or intreaty, should take place. Whenever any thing of the kind has in fact happened, for want of the bailiffs and parties constant observation, it has, if made appear, been deemed to contaminate their verdict so as to set it aside. All the Jurors swearing that nothing had passed relative to the cause, would not uphold it. Those who set about a private examination, especially of one side, after a public trial had, in order to stagger a Jury, and to render them dissatisfied with their verdict, act in the grossest

fest defiance of the law, and with the most audacious contempt of the Court they intend to affect or influence by it. It is embracery and tampering with Jurors, in order to defeat their own verdict. “ Even if after the
 “ Jury be sworn and gone from the bar,
 “ they send for a witness to repeat his evidence, that he gave openly in Court, who
 “ does it accordingly, and this appear by
 “ examination in Court, and indorsed upon
 “ the record, or *postea*, it will avoid the
 “ verdict.”

The inquest of surgeons, made in a case some time ago, being looked upon as calculated to discredit the finding of a Sworn Jury which had passed under the direction and eyes of two or three Judges, gave a general alarm, and yet it took rise from a merciful disposition, and was, perhaps, in the manner of it, as venial as any thing of the kind could possibly be, and was certainly not intended to question in the least, the propriety of that verdict, or of the trial upon the evidence then before the Court. But it serves to shew of how sacred a nature a verdict is.

This made me almost doubt the other day, what I read in the *Political Register* as a fact, that the Court of King's Bench on the part of the Crown, was moved for a rule to shew cause “ why the verdict in the
 “ *King against Woodfall* should not be entered up, according to the legal import
 “ of the words.” But upon enquiry at the
 last

last affizes, of a young man just called to the bar, who goes the home circuit, I found there had been some such motion. However, he added a circumstance, which I fancy he must be mistaken in (as young men frequently are, who do not regularly attend, and are in the boxes about the Court) that he heard the grand justiciary in a side speech, but loud enough to be heard, even by the bar, say to one of his brethren, when cause was shewn, and towards the conclusion of the matter “ that the thing had been decided, *the King against Beare* was in “ point” or words of that effect. Whether this be precisely fact or not, it will afford some apology for my dwelling so long upon that case, out of respect for what so extraordinary a personage may be only supposed to have uttered in favour of it. But upon such a case, I must say to ground a general rule for doing what hitherto has not been done, is giving great weight to it indeed. Shall it then be a word of course for the future in libel, (for I will not carry it, as perhaps not intended, to any other matter) to change the lay-verdict into a legal one? Lord Holt merely construed, in a legal sense, what a common Jury had said, but this motion goes on still farther, and is to change it *ipso facto*, into legal words, which will have this additional effect, that it will take away all possibility of the Lords reviewing such sentence.

The only amendment ever thought of before was, where the clerk had blundered, and not entered the verdict as it was given. In such case, his error ought not, it was thought, to be a prejudice to any body; and therefore ought to be set right. This is not altering a Jury's verdict, but is done expressly to prevent its being altered by the misprision of some officer of the Court. In this particular, we all concur with my Lord Mansfield, who (according to my magazine) declared, that "in the case of Gibson for forgery, all the Judges were of opinion, that where the officer had drawn up the verdict, *contrary* to the finding of the Jury, it might be amended;" that is, made agreeable to the fact. But my monthly informer, does not go on and say, whether his Lordship took notice, that this was in the case of a professed special verdict, which circumstance, may make some little difference in the matter. Indeed, I apprehend, that the Judge who tried *Woodfall*, and the Court of King's Bench, as well as council for the Crown, have clearly intimated their opinion, that the verdict here is not special, without declaring, however, expressly, whether it be or be not a general verdict, or else something between the two, that is, neither the one nor the other, but biform, and, as it were, of the composite order. And, as the Court hath not as yet pronounced its deliberate opinion, it may not, perhaps, be in me an unpardonable presumption to opine, that it is really of a mixed nature.

nature. It is not completely a special verdict, because it does not find every fact in the cause definitely and distinctly, nor negative expressly what it does not find ; but it partakes so far of the nature of a special verdict, as to find, specially and completely, whatever it does find ; and, for preventing any supposition or construction to the contrary, has anxiously, and from superabundant caution, inserted the exclusive word *only*, to act with the force of a negative upon every conceivable addition. They might either do this, because they found no evidence to warrant their finding any thing more ; or, because they saw ground to exclude every thing else. But whatever was their motive, the fact is, that they have negatived all but the printing and publishing, both the innuendoes about the blanks, and the sedition and malice, if not expressly, yet by necessary implication, which amounts to the same thing. In this case, indeed, it happens, that there can but two other circumstances be said to be laid in the charge, which are the innuendoes and the malice : therefore the exclusive word *only*, is precisely levelled at these. It can have no other application, and is improper, unless intended to signify that they were considered but repudiated and rejected, there being no pretence for finding them. And this is what the Jury swear. Notwithstanding they were told, (according to practice,

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it seems) that they had nothing to do with any thing but the fact of publication ; yet it appeared so clearly to them, that there was no sedition or malice accompanying the impression and publication, that they could not, whether it were a work of supererogation or not, refrain from shewing, that in their opinion, there was no ground for such charge. This, indeed, is plain, from another consideration, which is, that every common Jurymen knows what it is to find any defendant generally guilty, and therefore, had the present Jury thought that, in conscience, they ought to have found *Woodfall* guilty of the whole charge, they certainly would have found the usual verdict of guilty, without saying more ; and there is but one assignable reason for their not having done so, which is, that they did not believe it, and this they have manifested by as pregnant a word as any in the whole English language.

Suppose a man, upon being very ill, after eating beef steaks with oyster-sauce should take ten guineas from a friend, in order to pay him one hundred, whenever he should again eat beef steaks with oyster-sauce, and to secure the payment of the money upon that event, should deposit it in the hands of a trustee. The matter comes into Chancery, and an issue is directed to try the fact. The jury find, that he had eat beef steaks only, and will find nothing else. Would any lawyer
con-

contend, that the oysters being only sauce to the beef steaks, was a matter of course, and that the Jury, by finding the defendant had eat beef steaks, had virtually, and according to legal import, found a verdict against the defendant, and that he had forfeited his wager? Now, I look upon malice as the sauce, at least, to the publication of a libel, and absolutely necessary to make the information relish, and be good for aught, and not idle garnish upon the brims of the dish.

My Lord Chief Justice *Hale* says, “ the
 “ Jury may find a special verdict, or may
 “ find the defendant guilty of part, and not
 “ guilty of the rest; or may find the defen-
 “ dant guilty of the fact, but vary in
 “ the manner. If a man be indicted for
 “ burglary, *quod felonice & burglariter*
 “ *capit & asportavit*, the Jury may find him
 “ guilty (felonice) of the simple felony, and
 “ acquit him of the burglary (the burglari-
 “ ter.) So if a man be indicted of robbery
 “ with putting the party in fear, the Jury
 “ may find him guilty of the felony, but not
 “ guilty of the robbery. The like where
 “ the indictment is *clam et secrete a persona*,
 “ &c.” And this great constitutional law-
 yer concludes with saying, as to giving judg-
 ment on verdicts, where there is any special
 finding, *tutius erratur ex parte mitiori*.

Where a man has been charged with se-
 ditiously and maliciously printing and pub-

lishing *only*, and with nothing else, if the Jury have found him guilty of *printing and publishing only*, it cannot be said they have found him guilty of *printing and publishing seditiously and maliciously*, nor that they have found him *guilty generally* of the charge. The propositions are not convertible, and when that is the case, nothing but a material alteration, a change of the sense, and real import of one of them, can render them so. Besides, *only* confines the finding to the one thing specified, the printing and publishing, and consequently leaves unfound, and excludes the residue, the innuendoes, sedition and malice. Nobody indeed denies, that *only* is a word of restraint; the council for the crown allow it to be so in grammar, logic, and common sense; but they nevertheless contend, that in law it loses this effect, and restrains nothing, or else is surplusage; that they are at liberty to construe the finding of the Jury, although not a member of the said Jury was a lawyer; according to the legal import of the words, as if they were all lawyers; and finally, that what is contrary to grammar, logic, and common sense, is good law. This is the strength, as I apprehend, of their argument, and it might, perhaps, have some weight before an Irish tribunal; but, as I take it, amid all the scandal of the times, an Irish head has never been imputed to the Court where this
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must be decided, and therefore I am not much afraid upon that score. It was, I presume, out of decency to the principal law officers of the crown, and for no other reason, that this new experiment was not treated with immediate contempt; for I can hardly bring myself to believe, that in this liberal season it can be given way to, when wills, though reduced into writing, and possibly by a lawyer, are expounded according to the intention of the testator, contrary to the agreed legal import of his words, and to former determinations of similar cases upon that principle, although this was the reason, in all probability, for leaving wills, like deeds, to the determination of the Court, and not of a Jury, as well as the judicatures being originally ecclesiastical, and proceeding according to the civil law. The same spirit of liberality that has got the better of the legal import of the words in the latter (notwithstanding a former case or two to the contrary) will, I trust, do the same by the other import, should there even be a dark case or two produced in support of the present motion. *Common sense* will, as we have seen, prevail against black letter, where the party whose act is to be affected, never heard of such black letter. In truth the meddling with a verdict in England, is yet a very ticklish thing; for being the opinion of the country, expressed by themselves in their native

native language, every body will assume the right of understanding it as well as the King's Attorney or Solicitor General, Judge, or Chief Justice. All the learned council for the crown, it seems, concurred in opinion, that the Court of King's Bench must be moved for leave to enter up the verdict according to the legal import of the words. The very motion therefore is of itself a demonstrative proof that all who advised, assented, or gave way to it, were convinced that the verdict as it stands, is insufficient for judgment being given upon it against the defendant, so that the Court must either rectify the verdict, that is, permit or direct another verdict to be made, or make one themselves, (what an impudent and troublesome request?) or else the defendant must be acquitted. Had not these crown lawyers been thoroughly assured that the verdict was insufficient for their purpose, they would certainly have moved for judgment upon it, because the latter motion would not by any means have carried so indecent an imputation with it as the former; which plainly implies, that the Judge who tried the cause, had taken an insufficient verdict, and therefore insinuates either inattention or insufficiency in him in the function of his legal office. And the matter is really so managed, that whatever be now done, it will be liable to strange difficulties, surmizes and misconstructions. If
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the Court grant the motion, it will admit that the verdict in fact taken, was insufficient for judgment and punishment by law, and that they must make it so; for, as was observed (according to my magazine) by Serjeant *Glynn*, if the motion be carried, it must be followed with another on the behalf of the clerk, whose business it will be to enter the verdict, to know what the legal import of the words taken is, a thing he will not take upon himself for certain to decide. It will likewise be said, as the same learned advocate urged, that this method was taken to prevent the re-judgment of the matter by a superior Court, because the effect of the motion is to prevent the real words taken as the verdict from appearing upon the record. And the world will ask why was this done, if the verdict taken was a good one? Would not the Court of appeal know its legal import, as well as the inferior Court? It looks as if this last were afraid of having its proceedings reviewed, imagining they would not stand the test. After one wrong thing done, is not this the doing of another to protect it? The bold English whig Chief Justice, left himself, at least, open to appeal and revision. Is this becoming a Court of Justice? On the other hand, if the motion be denied, it will be said to have been denied for the sake of supporting the reputation of the Judge who took this questionable verdict;

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and if judgment be given upon it, as it now stands against the defendant, not only the same arguments will be insisted on, that have been urged against the senseless, lawless case of *Beare*, but many more; as the present case is, for reasons before-mentioned, by far less supportable than that. Who can stop the tongues of people in these licentious days, from observing that Lord *Holt* gave judgment against a man as a seditious libeller, upon a verdict taken before another Judge, where many other charges were made; but that his successor had given judgment against a man as a seditious libeller, upon a verdict taken by himself, where no other charge was laid, and where the word *only* must operate upon, and be applied to this. Should the puny Justices determine the motion without their chief, it would make no alteration in the voice of the public, no more than if a case were made and sent into the adjoining Court of Chancery for the opinion of the present Commissioners of the Great Seal; so thin now is the partition between the two Courts, such the spirit of party of supposed influence, and of faction. Nobody like myself, merely as *amicus curiæ*, (apply the word as you may) will take the trouble *pro bono publico*, to fling out their thoughts upon such a captious subject, purely by way of precaution, before any irretrievable step be taken.

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This is, I know, very tender ground to read upon, as well as some other that borders upon it, but there are certain occasions when one cannot help looking upon every little incident as worthy the reconsideration of those in the most exalted sphere of life. These occasions are, when any popular distemper and dissatisfaction is spreading upon a general belief that the capital province of English Juries is invading, and step by step to be taken from them, under various artful pretences of improving the constitution, and of better securing good men against the violences of the bad. You know that

————— Things light as air,
Are, to the jealous, confirmations strong.

On which account, I think it my duty, as a citizen at large, and long retreated from the bustle of the bar and the state, to mention whatever in my apprehension may give the least ground for calumny ; whether the thing be true or not, is of no great moment, if it be circulated as a truth, and indisposes men to that reverence for the decrees of Courts, which I ever wish to see prevail, as from my heart believing it to be of the utmost consequence to the preservation of liberty. The purity of the Bench consists in impartiality, wherefore, Judges should, if possible, (like Cæsar's wife) be free, even

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from suspicion. It behoves them, therefore, to be wonderfully circumspect in all popular causes. Now, there is a rumour (*credat Judæus appella, haud ego*) that in the course of the famous motion, which has been the true ground of this letter, something slid from the Bench to the Bar like this; “ it
 “ must be granted in all events by the de-
 “ fendant’s council, that the verdict as it
 “ stood, hath found the defendant guilty of
 “ printing and publishing the paper, in the
 “ sense that was put upon it, in the infor-
 “ mation, after filling up the blanks;” and that on this hint, the council took a ground which none of them had either thought of before, or else cared to venture upon. But, I confess, I doubt my informant’s correctness, as to the argument itself, and much more as to the source of it. The latter must surely be mistaken, for I never recollect myself any passage in the least like it; and, if there be no foundation for saying so, the insinuation is as indecent towards the object of it as the motion, and more it cannot be. I dare engage, the noble Judge who tried the cause, will not, upon his honour, aver, that he asked *the Jury upon bringing in their verdict*, whether they meant to find that the libel was truly expounded in the information, that is, whether the blanks in the original had been truly filled up; and, if he did not, how can he or any one *now* supply,
 pre-

presume, and take for granted, so material a part of the finding? We are not to conclude it from the Jury's being told in the summing up, that this was a part of their consideration, and what they must attend to. They were, I suspect, told at that time, many things which there is great reason to suppose they payed no obedience to. But, however that was, we are not to reason from what should have been done to what was done, and to make verdicts by argument. Any verdict, ever so deficient, may be made good at that rate, and a fact not found be created in a trice. If the Judges of the King's-Bench, when Mr. Wilkes, known, by person, to all of them, presented himself before them, professed that he was the John Wilkes outlawed, and desired to surrender himself, stared, looked surprized, and at last declared, they could not know nor take notice of him, unless he were brought into Court by legal process; and therefore let him depart from the bar of public justice, as quietly as any of the crowd of amazed spectators, though an outlaw *ex professo*, and of the first magnitude, for blaspheming his God, and libelling his King; surely none of those Judges, whilst they retain the same head and way of thinking, will suffer any fact relative to a libeller to come before them, in any other than its true legal habit, according to form of law. They will say,

very candidly, as in the instance last put, it may be so, but they are not obliged to know it. Indeed, the example cited, shews such a rigid requisition of legal mode and figure, that were *Woodfall* himself, in *propria persona*, to come to the bar of the King's-Bench, and avow, that he did mean by the blanks the persons inuendoed by the information, I much doubt, whether so scrupulous a Bench would not say, we can take no notice of your viva voce declaration, there is a legal way for such a fact coming before us, which is the verdict, and we cannot take notice of any thing that was in issue in the cause, and is not there found by the Jury ; it was their province to find it directly if they believe so. This holds now more especially, as the verdict here is not the common general verdict, but a particular or special finding, and the Jurors have, as we observe, found that you only printed and published the paper, without saying what they found to be the import of the blanks, which it contained ; and, as they have confined their finding to the mere printing and publication of the paper produced, which paper is with blanks, they have really excluded all of the charge which relates to the innuendoes and to the intention of the publication, and these being both facts alledged before them by the information and not found, but on the contrary ex-
cluded

cluded, we must take it in form of law and as judges, that they were not true. We can take no notice at all of what you say, not being in custody and regularly brought before us.

They might in truth have added, in the words of Lord Chief Justice Vaughan, “ it
 “ remains, if they be found at all, they
 “ must be found by inference and argu-
 “ ments only. And as for that, though it
 “ were a *general verdict*, the finding the
 “ point in issue, by way of argument or in-
 “ ference, for the plaintiff or defendant, is
 “ never permitted, not though the argument
 “ be necessary and concluding. I confess,
 “ that strictness is not rigidly observed in a
 “ *special verdict*, where the Jury find only
 “ the matter of fact, as when in a *general*
 “ *verdict* they find both fact and law, that
 “ is, the whole matter in issue. Yet in a
 “ *special verdict* they must find the fact clear
 “ and without equivocation to common in-
 “ tent, else they find nothing whereupon
 “ the Court can determine what the law
 “ is. There are no words in this *special*
 “ *verdict* that can be strained to a finding
 “ of these (inuendos for example) by way
 “ of inference and conclusion. It cannot
 “ be made out by any rational inference
 “ that they have found them. For to find
 “ that such a letter was written, or such a
 “ book made by I. S. is not to find that all
 “ things

“ things, or any thing contained or men-
 “ tioned in that book or letter, are or is
 “ true *.”

It is in print that the council for the de-
 fendants wanted to read affidavits from some
 of the Jurors to explain their verdict, and
 that the Chief Justice immediately took up
 the matter, and said “ though *the Court*
 “ would not yet determine, whether the affi-
 “ davit of any of the Jurymen may be read,
 “ yet *I* have permitted *one to be read a little*
 “ *by way of stating it*, and I there find that
 “ the application of the inuendoes is not
 “ denied, only the criminal construction put
 “ upon the paper in the information. To
 “ have denied the one, would have been
 “ very material, with the other they have
 “ nothing to do. In that case, there would
 “ be no proof to them of the paper, as
 “ charged in the information. But, if the
 “ Jury find that the defendant published at
 “ all, they find the paper, as charged in the
 “ information, for that is their only enquiry.
 “ I take it from the affidavit which has been
 “ stated, that it does not appear, whether
 “ the Jury meant to say the paper is no li-
 “ bel ; if they had the least doubt whether
 “ the inuendoes were properly supplied,
 “ there should be a new trial. I summed
 “ up to them, that if they were not satisfied
 “ of the fact of publication, or had a doubt

* Vaughan's Rep. 75, 76.

“ of the application of any of the words
 “ in the information to the blanks in the
 “ letter, they must acquit the defendant.”
 And in some magazine (for all these things
 come into the country) it is said that upon
 one of the Judges asking “ Whether any
 “ Juryman would take upon him to swear
 “ that K—g does not mean King, &c.”
 Lord Mansfield said “ if any member of the
 “ Jury was to make such an affidavit, it
 “ would in a particular manner merit the
 “ consideration of the Court.” And that
 the learned coadjutor, before-mentioned,
 thereupon added “ the Jury are elected,
 “ tried, and sworn to determine concerning
 “ the matters contained in the information,
 “ therefore if they find any fact of publi-
 “ cation, they must find, not the simple fact
 “ of publishing that *Public Advertiser*, sold
 “ at the defendant’s house, but that very li-
 “ bel charged in the information.”

Before I consider what auxiliary argument
 may be drawn from this new spring, I can-
 not help saying, that I doubt the fidelity of
 the relation, as there are some things in it
 which I cannot well reconcile to prudence
 or practice, and others which I do not ap-
 prehend the force of. The reasoning most
 evidently is of a very different complexion
 from that of my Lord *Vaughan*, whose
 acuteness as a reasoner, whose learning as a
 lawyer, and whose integrity as a man have
 rarely

rarely been equalled, and perhaps never exceeded. He was withal a royalist, and a Chief Justice made by Charles II.

If it cost Lord *Holt* much pains to get quit of Lord *Coke*, I think there must be no small dexterity used to free the present case of *Woodfall* from being ruled by the authority of *Vaughan*. Can any man of common sense and honour say, that the Jury have now by their special finding, found the fact of publication, and the application of the words in the information to the blanks in the letter (and if either of them be doubtful, the defendant should have been acquitted, according to Lord *Mansfield*) *clear and without equivocation, to a common intent?* I put it as a *special finding*, because that is the strongest way of putting it; for, *if it were a general verdict, the finding the point in issue* (which Lord *Mansfield* agrees the blanks to be) *by way of argument or inference, is never permitted, not though the argument be necessary and concluding.* And this is the law even in a civil case.

By a mistake of the printer, the succeeding page is numbered wrong. Instead of 99, it should have been only 85.

It is not therefore material to examine, “ whether there may be something of a distinction in the books about amending a verdict in a civil and in a criminal case ;” and if there be, whether “ it is a mistake and there is nothing in it ;” or whether it be a sound and a legal distinction. For, in the present case, there is no doubt that the real verdict was truly taken, by the chief justice himself, as I apprehend, and not by the ordinary officer of the court. There is no misprision at all. The verdict has not been taken *contrary* to the finding of the jury : whether indeed it will be ordered to be so drawn up, we shall know by and by, some time in the wintry, political season of the year.

If I recollect right, the old rule was, that jurors, after mixing with the world, should not be received to explain their verdict at all, for fear of some undue practice with them. Affidavits from a jury were always rejected. Should a new trial be moved for or granted, both the motion and the allowance were derived from some other source. Now, if the *magazine* relation be authentic, I should be glad to be informed whether this old rule, being become too feeble from age to do its duty, lies under some temporal disability, or has been dismissed and superseded by any other, and what new regulation ? For from the account I cannot tell whether the affidavits were admitted or rejected ; nor whether their future admis-

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sion or rejection is to depend upon the discretion of the court, or to be ascertained by any positive rule? It seems as if much might be argued both ways from the interlude (I beg pardon, the interlocutory scene I would say) which has been lately exhibited and which will I hope be attended with some benefit to the bar in time to come.

The defendant's council, I agree and laugh when I think of it, who produced and tendered the affidavits, have been very cleverly taken in. They were not permitted to read them in support of the points they meant to put their client's defence upon, *as the court would not yet determine whether they might be read*; but, the chief justice in order to know the general purport of such affidavits, directed *a little to be read by way of stating* for the satisfaction of the court. When this was done, he perceived that the application of the innuendoes was not denied, but that the criminal construction, put upon the paper by the information, was. Whereupon he pronounced these two matters to be quite independent of each other, and then concluded, from the silence about the innuendoes, that the jurors could not deny their truth, nay he went farther, and construed their very silence into an actual admission of it. Never perhaps was there an abler manœuvre. And such is the legal effect of reading a little by way of stating. The wicked party (which is a main thing) can never make use of it at all, and yet the court

court, or crown, may strike out light enough from thence, to be able to see evidently a fact that was hid in absolute obscurity before, or in a word may verify or disprove any thing they please by it.

With respect to his Lordship's speech, it is not a hasty, but manifestly a deliberate composition; and yet (pardon me for the remark) there are three material terms in it which seem not perfectly free from equivocation, namely, *criminal construction, libel, and as charged*. However a little consideration lets one see that this happened by accident; and that the first and last must mean the same thing, and that *as charged* comprizes the fact of publication, the truth of the innuendoes, and the libellous intent, the three ingredients necessary to convict the defendant of the crime laid, that is, of publishing a libel. Without the first and second, the third cannot exist; but, it is possible that the two former may, without the third. This is evident from the notorious case of the seven bishops.

Nevertheless there are to myself four things clearly deducible from this famous speech; first, that the noble judge looks upon an explicit finding of the truth of the innuendoes to be so necessary, that the decision of the whole matter hinges there and depends upon it, “for a doubt of it should
“acquit the defendant, and a denial thereof
“by the affidavits would produce a new trial;” secondly, that it is his own opinion that

the jury are not to judge whether the paper be a libel or not, “ they have nothing to “ do with it ;” thirdly, that the jury, if they find the defendant published at all, find him guilty of the libel, “ because they find the “ paper as charged in the information, “ which is their only enquiry,” and fourthly and lastly, that the court *alone*, if the publication be proved, can and must acquit an innocent defendant, by arresting judgment.

Before entering into a particular discussion of the consistency and solidity of these positions, I will just throw out, that with respect to the present verdict, our sole enquiry must be what in fact it was, and not what it ought to have been ; that is, what the jury have done, and not what they should have done. If their verdict be corrupt, they ought to be punished, and the verdict set aside of course ; and, if it be unintelligible, it must be a nullity, for nothing can be made of it. And now to return to the speech.

As my understanding is slow and naturally dull, I hope I may be admitted to declare without the supposition of affectation, that I can neither readily reconcile all the parts of it with each other, nor can I discern the conclusiveness of the reasoning ; and as I love to be open and ingenuous, altho’ it be at the expence of my reputation for quickness of apprehension, I will honestly say why. In
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the first place, “ if the criminal construction put upon the paper in the information is denied (as from the affidavit stated I find it was) I take it that it does appear the jury meant to say that the paper was no libel,” because the whole and sole criminal construction put upon the paper by the information concludes to its being a libel ; and the chief justice himself, as we have just now seen, grounds his arguments upon the silence of the affidavits with respect to the innuendoes, so that the phrase *criminal construction* could not in his sense refer to them, and then there is nothing that it could refer to, but to the paper itself being no libel. Nor can I reconcile therefore his stating at the outset that *by the affidavit, only the criminal construction is denied*, with collecting afterwards *that it does not appear from the affidavit whether the jury meant to say that the paper is no libel*. In the next place, if the truth of the innuendoes be necessary to support the criminal construction (which I fancy Lord Mansfield will not deny) and that the criminal construction was the *gist* or object of the information, the affidavit-makers might think that by denying such criminal construction, they had shewn, that they, as jurors, meant to say the paper was no libel, and having therefore destroyed the very foundation of the information, need not lengthen their affidavit with stating unnecessary particulars. In a word, I consider
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the affidavits as saying in a general way, what the makers of them might certainly have said generally as jurors, that the defendant was not guilty. And if they are not now heard by the court, or listened to as jurors about their verdict, in what light do they gain so far the ear of the court, as to be indulged with *stating* what they have to say? a general verdict could not have been refused, nor could the members of the jury have been forced to explain upon what grounds they went, the verdict being clear, usual and legal. A jury indeed, according to Lord Vaughan, may like the several judges of a court form the same general conclusion from different motives: it is not requisite that they should concur in the same motives. They might or might not, for ought that appears, have believed the innuendoes to be rightly applied. They have not said one syllable to lead to a belief, or construction one way or the other. It is agreed that they are totally silent on the point. But, if the speech of the noble judge who summed up to them, did not want its common ingredients and effect, they must have both understood and been persuaded that the application of the words in the information to the blanks in the letter was their principal, if not only consideration, and must therefore have drawn their conclusion from a disbelief of the innuendoes. On the contrary how an inference, the reverse of this, can not only be made

made from the same premises, but be relied on as infallible, so as to make ground for deciding the question upon, is past my understanding. Indeed how the criminal construction can be considered independently of the innuendoes which are necessary to form it, I cannot well conceive. And therefore, I am perfectly amazed how from the denial of such criminal construction and mere non-mention of the innuendoes any lawyer can with confidence infer the admission of, or an incapacity of denying the latter. Is it usual, or necessary *in law*, for a layman swearing to his belief of a thing to state all the grounds of such belief? It certainly is not so among logicians or mathematicians. All writers whether professional or unprofessional make use of many conclusions, inferences and deductions, without giving the several steps or preliminary propositions from whence such deductions are made. I have heard too that wise judges *never* enter on record the reasons upon which they ground their decrees, because many a judgment from the sessions, plantations, and other judicatures have been set aside on account of the bad grounds entered for them, which judgments were right in themselves, and would have stood, but for the disclosure of the bad grounds, on which they were formed. The reasoning from nothing being said of a thing, either to its belief or disbelief by the deponent, is very precarious and inconclusive.

It is, without a pun, reasoning from nothing, and the common adage says, *ex nihilo nil fit*. It is, I believe, the first time that an argument from such a source was ever taken for positive proof, and considered as a ground sufficient of itself for a criminal judgment. Nothing can exceed the extravagance of such proceeding. It is possible likewise, that these affidavit-jurors might regard the *innuendoes*, the *criminal construction* and *libel* as nearly synonymous terms in this case, and therefore specified their disbelief of no more than one of them, for the sake of avoiding tautology and prolixity. In fine, it might be omitted for want of knowing that the court would expect a denial of the truth of the innuendoes; and they might well be excused for such an ignorance, because they must have heard that, if they would, they might have taken upon them to judge of the intention of the defendant, and if they believed, as they now swear, that it was not criminal, they might have found him not guilty. I can assure them, had I been upon the jury, and really believed so, I should have thought myself bound in conscience to have brought in such a verdict. But whether I am right or wrong in what I have advanced upon this head, it is I think not to be denied, that unless the court of King's Bench had signified previous to these affidavits being made, that they should consider none as material which did not deny the

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the truth of the innuendoes, they can have no pretence to ground a judgment against the defendant, upon an omission of that circumstance. It will be catching the jurors in a very unusual net; and what catching practice of any sort ever redounded to the credit of any party, cause or judicature? Nay, I will go farther, and say it is impossible to support any judgment given upon such ground. In the third and last place, I am not satisfied with the reasoning of the chief, in saying, “ that
 “ to have denied the application of the
 “ innuendoes would have been very
 “ material, because in that case there
 “ would be no proof of the paper as
 “ charged in the information,” and “ that
 “ if the jury find the defendant published
 “ at all, they find the paper as charged in
 “ the information, for that is their only
 “ enquiry.” For it seems to me, that the paper charged in the information is the paper actually printed, and, as a proof that it is so, the printed paper is always produced, to prove that charged in the information, which it could not do were they different and not one and the same paper. But a demonstration of this being so, is that any variance between the original, and the paper set forth, would be fatal, it must be the very tenor with the blanks, and not the purport thereof. And I suppose, if a regular special verdict were in any such cause to be drawn up, for the sake of determin-

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ing by a solemn judgment in Westminster-hall, whether the court of King's-bench, or juries, were according to the constitution of this kingdom, to be judges of the sedition and malice alledged in libel, it would be necessary for such verdict, to state that

“ as to &c. the jurors upon their oaths say
 “ or find, that the defendant on such a day
 “ published the paper in the information
 “ mentioned, and of the tenor there set
 “ forth,” and then to go on and say “ and
 “ the jurors further upon their oaths say,
 “ that they find the blanks in the said pa-
 “ per contained and set forth in the said in-
 “ formation, meant the persons and things
 “ applied to them by the innuendoes in
 “ the said information. But whether the
 “ defendant be culpable thereby of pub-
 “ lishing a seditious and malicious libel, they
 “ refer to the court.” Now, if this or any
 thing like it, would be the regular way of
 taking such special verdict, it is another
 proof that the paper charged in the infor-
 mation, is the paper actually printed. Be-
 sides, the intent of all judicatures is that a
 defendant should suffer for what he really
 did, and not for arbitrary and groundless
 suggestions in a bill, declaration, informa-
 tion, or indictment. It is the business both
 of judge, and inquest, to see that this take
 place. A prosecutor therefore, takes care
 by his count, to charge an editor with the
 publication of a libel, of such tenor, which
 he sets forth literally; agreeably to the fact,
 and

and in the doing of this, where blanks, asterisks, or cant words, occur in the original, after giving them as printed, he declares they intend such persons and things, and his council, at the trial, always endeavor to convince the inquest, that the blanks of the real paper so set forth, are rightly interpreted by the court, and when he has done this, he expatiates upon the wickedness, and malice evident ^{there}from, and aggravates them as much as he can. The jury if they find him generally guilty, do and must at all events, find that the paper has been both truly recited, and explained. In short the paper all along understood by the pleadings, the parties, judge and jury, is one and the same, the real and original paper, and can be no other. And it is the interpretation of the blanks, or the criminal construction drawn from thence, which creates all the dispute in the matter. The innuendoes make no part of the paper; they are placed in the information immediately after the respective words, to which they are applied, apart from them, and included within crotchets, on purpose to be distinguished from the paper itself, which is set forth; because, if it could be conceived that they made any part of the real paper, and were intended as such by the countor, they would occasion a fatal variance, and destroy the necessary tenor. This not only proves the paper published to be a distinct thing from the innuendoes,

but to be so considered by the information itself: For which reason the inquest may most certainly find the defendant to have published a paper of the tenor set forth in the information, but deny that the explanations, or innuendoes, applied to the blanks therein set forth, are true. And consequently the jury might in this cause, have denied the application of the innuendoes, although there had been proof to them of the publication of the very paper set forth in the information, and which was by that information, charged with those innuendoes; and therefore the jury by finding that the defendant published the paper *only* as set forth in the information, do not find the charges made thereon by the information. If this be so, as I protest it seems to me clearly to be, the argument on this head is grounded on a false and strange conceit. But were it not so, if by finding the mere publication, the jury find the paper as charged, they must find it not only pregnant of the sense of the innuendoes, but of the sedition, and malice, set out in the information; for, it is *equally* charged with both; and yet the judge assured the jury *they had nothing to do with the latter*, for it belonged to another examiner, and by their affidavits they have expressly denied the criminal construction. Neither can I reconcile his saying in one part of his speech, “ *to have denied the application of the innuendoes would have been very material.* In that case,

“ case, there would be no proof to the jury of
 “ the paper as charged in the information,”
 with the saying afterwards “ that if they
 “ were not satisfied of the fact of publication,
 “ or had a doubt of the application of any
 “ of the words in the information, to the
 “ blanks in the letter, they must acquit
 “ the defendant;” because the *or* in the
 latter passage, seems to imply that the
 speaker himself considered the fact of pub-
 lication, and the application of the in-
 nuendoes as distinct things, and that one
 might be found, and the other not, by
 the jury. For “ *be summed up to them,*
 “ that if they were not satisfied, or had a
 “ doubt about either, they must acquit
 “ the defendant.” Now, if this be true,
 the speaker has answered himself, and ad-
 mitted what I have been endeavouring to
 prove. Is it not at least conclusive to him-
 self, as *argumentum ad hominem* ?

There is a report too, whether well or
 ill founded those who attended the trial
 best know, that in your case, Mr. Almon,
 your counsel opened as your defence, that
 “ you were in the country when the copies
 “ of the paper, for the vending of which
 “ you were prosecuted, were brought to
 “ your house, that they were sold without
 “ your knowledge, that your name had
 “ been put to the title page, without your
 “ privity, and that so soon as you returned
 “ to town, you sent back what remained
 “ of the copies, and complained of the
 “ liberty

“ liberty taken with your name;” that no witnesses were however examined to give this testimony : but that the judge who tried the cause took notice of the defence opened, and said, had it been proved, he should have directed the jury to have acquitted you. If this be so, one would be inclined to think that this judge did not regard the jury, as having nothing to do with the criminal construction, and with the consideration of the intent with which any act of publication was attended, nor that this was solely the province of the court. But, in truth, whether any deed be intentionally done to injure another, is and must be before the jury, where a man is criminally charged with such deed, and brought to answer for it before them. In a civil action the sufferer may and ought to recover damages, from a person who has even involuntarily injured him ; but it is contrary to all ideas of justice, that such an unlucky or foolish trespasser should be criminally pursued as a bad man, and a delinquent to the state for what he did without evil intent, and be on that account fined to the public ; and if this be unjust, how can a jury find him guilty ? there can be no guilt where there is no injury designed ; and if a jury are induced to use the word guilty in their finding, and it be plain they only meant to find the simple fact, and to exclude all guilt, the verdict is incorrectly and improperly worded, but it

it is of clear import, and is in law a verdict of acquittal in criminal proceedings. There no reparation in damages is sought by the party injured. The wickedness of the agent, and not the injury to the patient, is tried.

After having said so much, it is matter of supererogation to take notice of what fell from a learned coadjutor to the grand justiciary of England, but it can hardly be avoided, out of respect to his person, at this time. His words by the monthly publications are these, “ the jury are elected, “ tried and sworn, to determine concern- “ ing the matters contained in the infor- “ mation, therefore if they find any fact “ of publication, they must find, not the “ simple fact of publishing that *Public* “ *Advertiser*, sold at the defendant’s house, “ but the very libel charged in the infor- “ mation.” Many of the arguments before offered apply to this. The jury are certainly sworn to try the truth of the matters or allegations in the information; and, by the way, the very calling of them matters, in the plural number, shews that they are several. Let us therefore enumerate them. One is that the defendant published the *Advertiser* sold at his shop, and set forth in the information *in hæc verba*; another is that the blanks therein meant so and so; and a third, that the publication of such paper, with such meaning, is a libel. How can it be said then,
if

if they find the fact of the defendant's having published that *Public Advertiser* with the blanks therein, agreeable to its tenor in the information, that by finding this one fact, they *must* find not that single fact, but the very libel charged in the information? surely, the proving of the paper with the blanks as set forth, is not proving *ipso facto* the innuendoes with regard to those blanks; nor is the proving the publication of the paper, and the truth of the innuendoes proof in itself of a libel. By a parity of reason, the jury may find the fact of publication, and not find the blanks to be properly filled up. The filling up is the informant's, and the publication with chasms the defendant's act. The one writes (or publishes) and the other construes. Now these two things being separate in their nature, altho' the information should unite them, and make them one consideration (which, however, I do not admit) yet, it is possible the jury may have considered them distinctly, and it is plain that Lord Mansfield did so in his instructive summing up, when he talked of them as two facts for their consideration, either of which not being proved, the defendant ought to be acquitted, (and, in that, I perfectly agree with his lordship). However the jury might be puzzled by the several divisions run upon the subject, and hearing over and over again, that they must find the defendant guilty, unless they disbelieved

believed the fact of publication, by which summary way of speaking, the judge (I suppose) might mean the paper, as innuendoed; the jury were led into this special finding, whereby they have found the publication, and excluded the innuendoes, altho' they should, according to the directions accurately understood, have found the defendant not guilty. The consequence of which is, that this verdict comes before the court for a construction, and this can only be made agreeable to the intention of it. It is a question of fact therefore, what did the jury mean, and what have they said, and not what should they have said? nor what should they have done? We all know, without doubt, that whether the filling up be right or wrong, depends upon the meaning of the author, and whether the publication be criminal or not in the publisher, depends upon his knowledge of the meaning; but finally, allowing the paper to be truly interpreted and proved, whether it be a libel is still a distinct consideration. In a word, the finding of one thing, is not the finding of another, much less is it the finding two or three things. As to the last point, (the sum of the whole) the libel itself being before the jury, I think we agree; for the learned judge, by saying that "the jury are sworn to determine concerning the matters contained in the information, and that they must find

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" not

“ not the simple fact of publishing that
 “ *Public Advertiser* sold at the defend-
 “ ant’s shop, but the very libel charged in
 “ the information,” must mean, that the
 jury are not merely to try the single fact
 of publication, but all the matters con-
 tained in the information, that is, every
 thing charged and loaded upon the paper.
 For which reason the jury must determine,
 according to this authority, whether, in
 their apprehension the same be a libel or not,
 for that is a matter very strongly charged
 on the paper, by the information, and the
 sum of the whole. But, this subject,
 some how or other, like school divinity,
 is not only a quicksand for common, but
 for excellent sense, and involves the arguer
 even in self-contradictory terms.

In the Star-chamber, as has been ob-
 served, where no jury was admitted, all
 state-libels were formerly tried, and of course
 the judges of the court wholly determined
 what was, or was not a libel. The re-
 verend bench has therefore ever since
 claimed the exclusive right of deciding this
 point, without considering that by the
 principles of the juridical part of this con-
 stitution, where a jury is summoned, the
 judgment of all facts must be left to them,
 and that this holds throughout the region
 of crimes. The intention of a supposed
 libeller is as much within their cognizance,
 as the intention of any other supposed
 criminal; and what judge pretends to
 question

question their competency in this respect, as to every offence besides? *boni est judicis ampliare jurisdictionem*, is a maxim more remarkable for its oddity than its propriety.

Supposing now the printed relations true, would not any one say, that in the great man's own opinion, the verdict had not found the innuendoes, nay, that he himself was even apprehensive it had excluded them? and, that there could be no other way of accounting for his listening to affidavits from jurors disimpanelled, or his saying, that had they denied the truth of the innuendoes, there should be a new trial?

By the bye, how could any bench or judge admit jurors to be judges whether blanks were truly filled up, unless they allow jurors to be judges of the meaning of the blanks? this is, surely, an inference made by the mind, as much as whether the paper was printed factiously and maliciously. The defendant's intention by the printing of blanks, is very distinct from the mere inanimate mechanical effect of his press upon the letters, ink and paper. It is not a visible external act, but internal, and a mere operation of mind. In reality, it is absolutely impossible from this and various other considerations, to contend that the design of the writer, printer and publisher, in matter of

libel, is not always to be submitted to the jury, for their opinion.

But, for a moment admitting the contrary doctrine, what must be the effect of it? it must be that the jurors, having nothing to do with the intention of the writer, could not find what he intended by the blanks, and could only find the fact, of his having printed and published a paper with such blanks. And then there is an end to their pretence, that the jury having by their present verdict actually found, that the defendant by such blanks, intended what was innuendoeed thereof in the information.

Well then, to avoid this pressing ultimate difficulty, we must, after all, resort to the sole true doctrine, namely, that the jury are judges of the intention of the writer, and consequently competent to the whole of the charge in the information.

This being at length conceded, let us ask whether they have not in fact exercised this right in the full extent, by the late verdict, whereby they find the defendant, who was charged with printing and publishing a paper of such tenor, and with meaning such persons by the blanks therein, and with putting forth the same maliciously, to be guilty of *printing and publishing it only*, or (in other words) of the bare impression? does not the word *only* signify *singly, simply and merely*? if so, does it not acquit the defendant of the innuendoes,

does, and of the whole criminal construction put upon the paper? by finding him guilty of the publishing the paper as printed with blanks only, of this *one* thing, it is evidently and certainly implied, that he was charged with other things, and that they could not find him guilty of any of those other things. The word *only* can have no other meaning than to confine and limit the verdict to the simple publication, to that precise individual thing, and consequently to exclude all the other matters.

I shall therefore conclude with saying, the sole sensible construction of the verdict, in my poor opinion is, that the jury have found the defendant guilty of nothing that is a crime, and have therefore virtually, tho' not in express words acquitted him. The use of the word *guilty* in the verdict, will not make guilt contrary to its clear meaning by a context. Such a construction is a force upon the words, and makes nonsense. Now, it is impossible to suppose, so eminent a judge could receive a nonsensical verdict. Besides, the law prefers and adopts any construction, that supports to one that destroys a deed.

One is, I allow, apt to be too cunning in the kind of animadversions, which I am making, even without having any the least personal ill will, and I certainly have none, and without there being any personal interest in the matter of either side. But, unless I am much mistaken, there is something

thing remarkable in the whole of our grand justiciary's conduct in this business, something strikingly characteristic — His anxiousness to know what the jurymen had sworn by their affidavits, inasmuch as to direct the purport of them to be stated, although they could not be read; his refraining till this was done, to say what was the sense of the verdict; his then taking notice that the jurors had not denied the truth of the innuendoes, which was the only thing that could possibly be material, and which had they done, there should have been a new trial; his stating that he had particularly put them in mind of the innuendoes in summing up, when he told them they were the principal, the only object of their enquiry, and, if they even doubted of the truth of their application, they ought to acquit the defendant; his asserting that the information had so joined these innuendoes, with the publication, that if they found the defendant published at all, they must find the paper, as charged in the information: And yet, what?—doing nothing in consequence of this clear result, neither making the rule then absolute for entering up a legal verdict, nor saying that must be done, nor appointing any certain day for reconsideration of the matter, but generally adjourning the whole till next winter. Is it not rather observable also, that no notice was taken, by this circumspcct, and satisfactory law-dictator, of the word *only*,
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the most singular expression in the verdict, the main theme of the arguments of counsel, and of the attention of the bar? and, that throughout this well advised, pregnant, and pithy speech, this supreme crown-magistrate never once declared, what he himself really believed in his conscience was the intention of the jurors, by this their peculiar verdict, nor ventured to assert that they actually had found the truth of the innuendoes? Is not all this conviction where the shoe really pinches?

His candor is such that he would have been explicit, I dare engage, upon these points, especially as being the judge who received so unusual a verdict, had he been aware that the audience went away persuaded from his silence, upon so obvious an article, that he himself could not but believe the jury meant to find no more than the publication of that *Public Advertiser*, wherein were the blanks, and to declare they found nothing else. I wish therefore, he would, on the next hearing, (should the matter not be put to sleep like *Bingley's* attachment) vouchsafe to notice the word *only*, and likewise to favor the people with an express declaration of what he really does, and not an argumentative one of what he must believe the jury intended by their verdict. For this after all is the sole thing requisite, could it be come at, for deciding the untoward difficulty of the case. We should all then be of one mind. It is therefore a
thousand

thousand pities that this little word *only* escaped his Lordship's attention, and that he did not think of candidly acquainting the public with his own private belief of the jury's intention by their verdict, more especially as the taking of it was his proper act in his own house.

At present my neighbours are always asking, " why would the affidavits have been
 " so material, had they denied the truth of
 " the innuendoes? The court must doubt
 " whether the truth of them be not denied
 " by the verdict, or at least cannot be
 " positive that the truth of them is found
 " by the verdict; for, surely, if the jury
 " have found expressly either for or against
 " the innuendoes, nothing could be so
 " improper as to permit that finding, to
 " be controverted by affidavits; no court
 " would endure this, nor open such a door
 " for perjury, and the overturning of ver-
 " dicts in general; the true reason then,
 " is, the verdicts being defective, or inde-
 " cision in this capital point, in the opi-
 " nion of the court; and if this be so, is
 " a new verdict now to be made for the
 " purpose; and that not by positive affi-
 " davit to the point, but by inference
 " from nothing being said about it? This
 " is a way of coining verdicts, and mint-
 " ing justice?" I tell them the magazine
 writer has certainly libelled the court. It
 cannot be true. Indeed I suspected so
 much from that strange circumstance of
 judges

judges reading affidavits a little, *in a court of justice*, and not as evidence, and yet afterwards arguing from this little reading, as if they were evidence, not merely to collateral matters, but to the very *jugulum causæ*. However, in my first agitation, before I discerned the falsity of this relation, I really asked myself; is this or is it not an using of affidavits in administering justice? if it be, is it or is it not making them evidence? In God's name, is there to be no certainty from henceforward in the law, nor any rule to go by? Courts of Justice, when I was formerly of Gray's-inn, talked always of a plain line to walk by; obvious to common understandings, or that they themselves could at least always ascertain, and which was equally open to the whole world, to the countryman as well as to the courtier. I wish there was a little more certainty, and a little less ingenuity; not quite so much floating discretionary equity, but some fixed unequivocal, substantial law. Hold,—these magazine fellows misrepresent everything, and there is nothing but fallacy and wayward political conduct in all parts of life. I don't credit a syllable of what I read, whether published by you Mr. Almon, or by administration.—Besides, as to some matters, the less is said of them the better!

With respect to verdicts, it is commonly said that “ a verdict which finds part of
 “ the issue, and finds nothing for the re-
 R “ fidue,

“ issue, is insufficient for the whole, be-
 “ cause the jury have not tried the whole
 “ issue, wherewith they were charged.
 “ If a thing is left out and cannot be in-
 “ tended, the verdict is not good. But if
 “ the verdict may any ways be construed, a
 “ construction to destroy it ought not to be
 “ made. The court will reject surplusage.”
 And my Lord *Coke* says “ the matter and
 “ substance of the issue must be found.”

According to the foregoing rules, there
 can I think be no doubt but that the verdict
 in agitation is good. It may, and there-
 fore ought to be construed to have found
 the bare fact of publication, and, by find-
 ing that *only*, to have excluded the inter-
 pretation of the blanks, and the criminal
 construction laid in the information. But
 it is impossible by any construction to make
 out that it has found the application of the
 innuendoes to be just. The rejection of
 the word *only* as surplusage, will not serve
 the turn. My Lord Mansfield says, the
 jury are the sole judges, whether the blanks
 are truly supplied, and that this is the ma-
 terial part of the issue, and it is therefore
 requisite that the court which is to give
 judgment, should be satisfied that the jury
 have found it. In his summing up, he in-
 structed them, that if they did not believe
 the fact of publication, or had a doubt whe-
 ther the blanks were truly supplied, they
 should acquit the defendant. They have
 by a special finding, found the fact of pub-
 lication

lication *only*. Is not this expressly finding one of the two matters, which he laid before them, and rejecting the other? Apply their verdict to his Lordship's directory summing up, and there cannot remain the shadow of a doubt in any man's mind. But even by a hardy rejection of the operative word *only*, which the jury evidently inserted by design, it is impossible to make out that they have positively and unquestionably found the innuendoes by finding the publication; and the superinduction of the silence about them in the affidavits, as an admission of them, and a confirmation of such construction, is plainly ridiculous.

In short, the finding must be either a verdict or a nullity, but the latter cannot be supposed, as so able a man took it for a verdict. If it be one then, it must be either a special or a general verdict. If it be the former, the words most clearly cannot be varied. But it seems, on all sides, to be agreed, that it is not what is denominated in law, a special verdict; it must then and can only be a general verdict somewhat peculiarly worded, or (excuse the seeming contradictoriness of terms) a special finding of a general verdict. This being the case, nothing is left to inference or intendment (as has been proved before,) and the defendant must be either found guilty or acquitted. If he be found guilty, why is not the verdict entered as taken by the Chief Justice, agreeable to the finding, and sentence

passed upon the defendant? On the contrary, if it be admitted, as it is by the motion made, and the rule to shew cause granted, that no sentence or judgment can be passed upon the verdict, as it now stands; it must be a verdict of acquittal; there is no medium. Let me add too, that every man remains in the eye of the law innocent of any crime untill expressly found guilty of one; and if the verdict as it stands has not positively found the defendant guilty of any crime, he certainly remains innocent, and must be discharged as such.

Great geniuses are very apt, for the sake of avoiding trouble, and from superficial hasty considerations, to cast aside old formalities, by which they frequently do much injury to the public, and not uncommonly draw themselves into scrapes, which, had antient rites been adhered to, could not have taken place. This brings to my mind the old practice touching "privy verdicts," which are so called, because they ought to be kept secret and privy from each of the parties, before they are affirmed in court. Indeed, in strictness it is no verdict, until affirmed in court; for, the jury upon coming into open court, may alter their privy verdict, and, if they do, the latter shall stand." Such is the law. But many reasons may be offered in justification of the utility of it. If every verdict privately delivered is afterwards to be publicly confirmed by the jury in open court,

court, in the presence of counsel of both sides, it becomes the business both of bench and bar to see that the true and proper verdict be received. There is besides something in the air of a court of justice, and a public audience to rouse the thoughtless, and to alarm the corrupt judge. The awkward dilemma in which we now find ourselves, without being able to advance, retreat, or stand still with credit, and the suspense of judgment for four months, would never have disgraced the *K. and Woodfall*, had this small old ceremonial been complied with. The crown-lawyers would have had no occasion for making a motion, which favors of indecency towards the judge who tried the cause, inasmuch as it proceeds upon a supposition, that the verdict is insufficient, and should not therefore have been received; nor would the court of K. B. have been obliged so far to countenance the propriety of the motion, as to grant a rule to shew cause thereon. What can a bye-stander say of such a business, but that it hobbles at best?

Things are come to so strange a pass, that I think, the only consideration at present is, how to get off in the best manner; and as purity of conduct is of greater account in these matters, than ingenuity of device, that, and not this, must be chiefly consulted. I lament from my sincere regard for courts of justice, and the reverence I bear to them, that the heart and
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the head should ever be supposed to draw different ways, or that the surmise of indirect dealing should in the least obtain ; but malevolence and obloquy are the fruit of the season. Let us then drop that suspicious janus-faced expedient of searching after the *legal import* of the words, determine that the vulgar, common, natural, and real meaning is to be taken, and, if it be capable of more interpretations than one, that the most favourable must be adopted ; or, finally, if no meaning at all can be made out, that the verdict is a nullity, let who will have received it. Altho', it seems to me, as Serjeant *Glynn* has argued, that as "juries are said to " negative in questions of civil property " every thing which they do not find ; " much more must they be said to do so " in criminal proceedings." It is not only law, but the saying in other words what has been before advanced, namely, that a criminal intention must be found expressly, before guilt can take place at all, and it must be found expressly, and not presumed against any defendant.

Where the paper is not, like a law-instrument, drawn in technical, legal expressions, nor the devise of property (the creature of law), it wants no comment of lawyers, and it is the proper province of laymen to put a construction thereon, and to find the intention, that is, whether the questionable expressions are used with a
criminal

Criminal view or not. The determination in the case of *Bear* is indefensible; it is not indeed, gross, palpable Irish nonsense, obvious to the poorest understanding, but it is, what is as bad, metaphysical, scholastic, sophisticated nonsense. The attempt to enter up a verdict different from what was really given is still worse, and would alarm the public forty times as much. It would be understood as an experiment, made for the purpose of enabling judges in crown prosecutions to make a verdict for juries, by recommending it to them at the trial, to find the simple fact as it should appear to them, because the court would take care of the rest; and then for the court, before giving judgment, to direct the verdict to be entered up according to the legal import of the words, that is a general verdict of guilty to the whole charge. For, if this may be done in the case of *Woodfall*, where the jury have scrupulously added the word *only*, it may most certainly be done in any case whatever, as a stronger cannot be suggested. The people would really then think, that there was an end of the trial by juries in crown causes, and that though one was ostensibly summoned, it would no more answer the true constitutional purpose, than the insignificant parliament of France answers to the effective parliament of Great Britain.

There

There is after all, in my own opinion, nothing like travelling the old beaten road of the constitution, without starting new schemes from a desire of shewing superior parts, or for the sake of introducing what one thinks would be an improvement in the law. A man may happen to dislike the trial by jury, and an unlicensed press, and would really, had he the modelling of a government, under which himself was to live, have neither; but if the course of his profession and extraordinary talents were to bring such a man to be Chief Justice of England, (by far the most important post in the kingdom, because all disputes between the king and the subject must there be tried,) he must be content to take the law of England as he finds it, and to administer it in the usual way. Every open attempt to change it (however sincerely he might mean an improvement) would tend to his own discomfort and disappointment, and every subtle and indirect step for the purpose would subject him to contumely and to the worst and most injurious of imputations. If a law is to be strained, or a verdict either to be compassed or construed artificially, for the sake even of a good end, for the punishment of a popular rascal, it is a gross injury to the constitution, and will lead the way to a thousand perversions of the law for the sake of very bad ends. Twenty absurd or unjust verdicts in factious times, against libellers in particular, will
not

not weigh as a straw against the noble service that juries have done in arbitrary reigns, in the case of the seven bishops, and in many other instances, by which in a great measure, the liberties of this country have been preserved. The same may be said of heretical or deistical writings ; in short of a free press generally. Besides, I am one of those who doubt whether the great men who have presided in our courts of law formerly had not as much acute understanding and sound judgment as any of the able men now living. As in hearing counsel it will generally happen, that the first says every thing, yet it will sometimes fall out that even the third (though a plain man) shall hit upon something so material as to weigh in the decision of the cause, and therefore they should all be heard : So with respect to old forms, they seem for the most part tedious and useless, yet the omission of them shall in some particular case occasion a difficulty which could never otherwise have happened. It is therefore a right rule *stare super vias antiquas*, to expound and to execute the law in the way that our forefathers did. A judge that is for striking out new paths in the law which has stood the test of ages, and either imagines that he himself is right, or that the world will think him so, counts without his host.

If old forms were to be rigidly pursued, there would be no room for much display of parts, and the proving of any thing, by

any thing, which one now and then hears of. The desire of improving the law and constitution, is dangerous vanity at the best. And were there at any time to arise some one particular judge who should think much change necessary, and at the same time such judge should never try a popular cause; or decide any point between the crown and the subject without affording just matter for animadversion and surprise; or, in vulgar terms, without making himself the subject of every body's comment, I should doubt his having greater discernment or more infallible judgment than those who went before him. It would rather introduce some suspicion of the hollowness of his head or his heart. If the former were the case, the apparent superiority of his talents must lie rather in sophistry than in solidity of judgment, and be better calculated for immediate victory and triumph, than for giving final and lasting satisfaction. Temporary speciousness is but a mischievous, treacherous quality in a judge, although it be every thing in an advocate. I remember many years ago, a supreme law-magistrate, who, both in the King's Bench and the Chancery, manifested the utmost deference to former determinations, a solicitude to find out the true grounds and principles on which they proceeded, and a desire of hearing all that could be said by the counsel of either side. He would then deliver so legal, so sound, so comprehensive,

five, so justly principled a judgment on the points before him, as satisfied all mankind of the impartiality, of the truth, of the circumspectness, and of the professional and juridical correctness of his decrees. In short, he heard fully, and determined completely. He was neither at constant war with juries, nor with the law and forms of our forefathers. He performed his part without ostentatious smartness, superciliousness, the artifice of logical ratiocination, or the parade of civil law, learning, and the authority of imperial codes. His conduct on the bench won the respect of every body; parties, counsel and bar: for twenty-three or four years successively. And time itself and future discussion, have not impaired or shaken his sentences. Nevertheless he is not supposed to have been freer from selfish and political views than other lawyers, that is to say, other men. But he had too much cool sound sense, with the magisterial gown upon his back, in deliberating upon legal matter, to look at aught but the precedents of former times, the arguments in the cause, and the genuine principles of law. He knew that neither the weight of his office, nor any present artificial refinement, could preserve his opinions and demeanor from being scrutinized by a discerning bar, and (should they detect any fallacy and obliquity, as were there any they certainly would) from being abused by the public.

Such a silent sagacious auditory will see through the greatest sophist that ever spoke; and, after scanning his sophisms among themselves, by degrees drop their shrewd redargutions among the world. With acute practisers every studied preface of impartiality, of prodigious firmness, of a disregard of danger even to the loss of life, and of an extreme anxiousness in any crown prosecution to find out the smallest *iota* of justification for the defendant, will only raise an extraordinary attention to every colour of good or evil, to every shade or light, made use of by such judge, and to the whole of his gesture; for their jealousy will be set on the watch by the undueness and unusualness of an elaborate exordium from the chaste bench of sober judicature. What should make so artificial a beginning necessary? Judges who mean nothing unfair need never recur to these meretricious arts. Why then should you use them? Do you imagine the world suspects you of some design of not doing your duty? If not, it must be your consciousness of intending some duplicity that makes you thus call in beforehand such guards to your reputation. Genuine simplicity and pure virtue are ever devoid of fictitious ornaments. Every extraordinary declaration, side speech, hint, tone of voice, look or gesticulation will furnish matter of animadversion, and the user finally dupes himself and becomes the sacrifice of his own artifice; whatever seeming conviction and

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rhetorical applause his argument or oration may carry with them at the time. Truth stands the edge of professional and popular discussion, but sophistry of neither; for it cannot alter the nature of things, although it will disguise their appearance for a while. Time will always sooner or later detect the adultery. *Opinionum commenta delet dies, naturæ judicia confirmat.*

So censorious are the times become, that mankind frequently places to the score of court-influence, or court-views, what really and truly has no other foundation than enormous, over-weening vanity. At other times it mistakes for deliberate mischief, a deviation really made for the sake of attaining particular justice. And yet there is no harm done by such censure, for a departure from established rules is generally mischievous, as no foresight can reach all the possible consequences of it; and it certainly tends to the exercise of a discretionary judgment, the most pernicious of all principles for human courts of justice. The pretence of adapting the judgment to the peculiar circumstances of each individual case is specious, but it cannot be done without the destruction of all certainty and positive law. It is opening a way for arbitrary decision and judicial tyranny.

Let us recollect what a noise the alteration of a record, after issue joined, produced; it being unusual. After discussion and search of precedents, it was found to be

be sufficiently warranted both by law and practice. It may be done by any judge at his house, the very minute before trial without the defendant's consent. However, nothing but a solemn decision on the point would have appeased all discontent about it. The notion, that a defendant might have so far trusted to some flaw in the pleadings, which he was well advised would be fatal, as to forego the bringing of testimony in his behalf, notwithstanding he really could have done so, was the ground of people's alarm. The making of a defence on the merits necessary just as the cause is called on, which was unnecessary before, made the world conceive an honest defendant might be convicted sometimes by surprize, and that such an alteration of the record could not therefore be just, and consequently not legal. They had heard that it had grounded a complaint to parliament in K. William's time, against a judge (one Halloway, I think). But it is now settled, and therefore notorious, and nobody in particular can be injured by such practise hereafter; Mr. Wilkes no more than Dr. Shebbeare. The occasion too frequently adds to the suspicion, and none is so likely to minister ground of offence, as the case of a writer against administration.

Were I now to make a guess, *the K. against Woodfall* will make a great noise, and the people will suspect much more de-
ceit

ceit and circumvention, than if it were *North* against *Sandwich*, *Barrington* against *Hillsborough*, *Jenkinson* against *Dyson*, *Grenville* against *Chatham*, or the case of any other more private combatants whom you may name. A judge has an unpleasant task, in these cursed crown causes, especially if he is obliged to alter the words of a verdict, after the jury giving it are discharged. It is worse than the alteration of a record immediately before trial. The ignorant populace will say that no defendant is safe, either before or after trial, neither with or without a jury, from the correction of such dextrous lords of police. Should a general verdict of guilty be extracted from the late particular finding of the jury, whether by the analytical or the synthetical mode of argumentation, no lenity in the fine and punishment will make a plain English juror relish the adjudication. It will be said by the invidious opposition, and credited by the vulgar, that so slight a penalty was inflicted for the sake of establishing the precedent, and they will resist it, as *Hampden* did the pittance of shipmoney demanded from him, or as the Americans do the payment of the paltry tea-duty (not that I mean to insinuate the least real similitude between the legal merits of the two last mentioned considerations). I know that nothing but the purest regard to the letter of law, and to the true constitutional interpretation of it,

it, will have any influence on our reverend bench of criminal jurisdiction, unswayed as they are by personal love of authority, or private interest, by fear or affection, by court or people : but, it is an unpleasing situation, that the reception of this singular verdict has brought them into. For my own part, I have taken occasion from the prints of the season, and the suspense of judicial proceedings during the vacation, to fling out my disinterested reflections upon the subject, and in so doing have grounded myself as to names and doctrines upon the magazines and registers, without being at all sure that they are genuine or just ; but an old and a feeble man, no barrister, tho' formerly bred for one of the inns of court, and still intimate with lawyers, may perhaps here and there suggest what is more worthy of observation than the rabble of Gazetteers or the listed writers of a party. I do not pretend to be free from prejudice, altho' I wish to be so, but every man is insensibly warped by the company he keeps. An occasional residence in town, and dinner parties at law-taverns and meetings at law coffee-houses, furnish me with most of my information, for I have not (thank God) seen the inside of a law court for many a year, and being above want, and past ambition, I care not three straws who is minister. To say the truth, nothing warms me in political matters besides America, which I presume is intended

ed to become the King's separate dominion, independent of the controul of parliament, as Scotland was before the union. We are here taught that the English sovereignty resides in the king, lords, and commons, and that the king can do nothing with any part of the British dominions, without the consent of his parliament; but, if I now understand the fashionable, popular, doctrine, it is that the king with the provincial assemblies may govern as he thinks fit in America, altho' its inhabitants went from hence as subjects of the *British* state, and when they come hither claim all the privileges of such. In short, they have every advantage of the parliamentary constitution, and are no aliens, in Great Britain; but, if they return to America, they owe no obedience to it, and are as totally exempt from its superintendence as the Hanoverians or Lunenburghers. Your laws are of no avail, but as adopted there; they may receive or reject them, as we do the civil law. Their acts of assembly need no ratification in parliament; the king's assent or his governor's is solely necessary: their appeals are not like the Irish to the British house of lords, but to the king and counsel. The king with their assemblies may raise what money, levy what forces, and use both for what purposes shall be agreed on, without the controul of parliament. They are called colonies, and as such may be supplied by grants of par-

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liament,

liament, and defended by British armaments maintained by parliament, but, they are, nevertheless, subject to no more controul from parliament than Portugal or Prussia. It seems, neither they nor we are represented, all government is at an end, and their rights (in the language of a rebellious letter, honoured with the name of a learned serjeant) are invaded, because the British state has claimed to govern them by its parliamentary statutes. They are subjects to the king, but owe no subjection to the British government, unless it be understood that the parliament which made the king formerly, now makes no part of that government, and that the whole resides in the king alone ; and yet it may not be easy perhaps to give a good reason how this should come about, and that they should be able to shake off the parliament, without shaking off its creature. However, as the affair of America is of no moment with any set of men ; I shall drop it as an insignificant subject, in comparison of Mr. Wilkes, and resume the noble topics that we busy ourselves about, in the warmest and most violent manner.

Having, really and truly, no connection with great, political men, I am very little concerned about their sentiments with respect to myself. The only matter that creates any uneasiness, in my desultory way of writing, is, lest I should draw a suspicion upon any other person
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of being the author, which I should be heartily sorry for. It might injure such man with his friends. And yet, where a story is told one, or a sentiment thrown out, or particular ways of reasoning, or modes of expression used, which happen to strike, it is difficult to avoid the repetition of them with one's pen, in such a manner as to create with others, a surmise, that they, the original ventors of them, are the printing author, or to induce a belief in themselves, that some companion may have made an unfair use of what hath been dropped by them in private conversation, and from thence to be uneasy and to suspect, perhaps, several of their occasional intimates. Let me, therefore, protest that I wish to be guilty neither of betraying what has fallen under the general sanction of free gentlemanly discourse, nor to hurt any particular man; but to plead for myself, that a thorough scrupulous attention to such delicacies would prevent my writing at all, and that I trust is more than any individual has a right, upon such ground to exact from me.—Indeed, the more I relish a man's discourse, the worse I shall use him at this rate. Now, I am not given to talk much, but I sit a great many hours in coffee-houses, where I cannot help listening to the discourse of young disputatious barristers, who are inclined to shew their talents in argument, and their ingenuity in observations on what has passed,

to whet their tongues for the bar by discussing points, and to acquire a little modest assurance in speaking before company. These staid counsellors of no business, retainers to great men, idle members of parliament, old benchers, and other loquacious, legal, political gentry, that newspapers, and nothing to do, bring in my way, are, I confess, my best sources of intelligence, and the oracles I consult for the better understanding of what I read in political pamphlets. Being unaccustomed to gain my subsistence by my pen, and not having acquired the knack of writing, I am fain, very often, to use the words of the persons, from whom I derive my knowledge, from a poverty of expression that I labour under, and an unreadiness in law-language, a propriety in which nothing but practice at the bar will give. My fearfulness therefore, in misreporting what I have heard, must in some measure, apologize for my not having varied so much as I could wish, the habit, dress, and peculiarity of the relations which I retail. For, I solemnly declare, I should be ashamed, wantonly, to make any illiberal use of what men of honour have very unadvisedly uttered in my presence. But, what is said in a coffee-house, a public walk, or at a mixed dinner, cannot be deemed a perfect secret, and I have foreborn alluding in the least to any of them, and have delivered every thing in my own
anonymous

anonymous person. What I here say, I apply to the middling gentleman, who, perhaps, is of a particular party, and tho' a retainer to it, a man of worth; for, as to the leading men of all parties, I have long ceased to think they mean any thing but power, places, wealth and titles, without caring at all for the public, and if they do the state any good, it is by accident, or because it suits some present purpose of their own, and not for the sake of the community, or of pure patriotism itself. Nor can I join the mobility, and dance round their hobby-horse Jack of Aylesbury, as the whores in the *Beggars Opera* do round Captain Macheath. But I speculate and think for myself.

I wish to have government respectable, and my principal objection to the small ware of ministry of the day, is that they have no heads at all. The government and the laws I shall be against changing, being no friend to innovations, but a sincere one to liberty. There can be no harm in attacking ministers; but, let the House of Commons, the bulwark of the democratic part of the state, retain its dignity, prerogatives, and independency, and let the laws be faithfully and boldly administered without refinements or sophistications. One of the errors of the times has been the effort to diminish the reverence for parliament, and for the courts of law, which can
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tend to nothing but to arbitrary power, and the governing without either, or to a general dissolution of the state, to anarchy and mob. The remarks which I have freely made on the *K.* against *Bear*, and the *K.* against *Woodjall*, are intended to check that strain of legal interpretation which revolts the public and leads to a distrust of the uprightness of judicature, by introducing jesuitical casuistry, in lieu of plain, obvious, common sense. It will never do, if exercised by angels. Distrust will beget dislike, contempt, odium. Nothing can support penal judgments, where the freedom of the press is concerned, and liberty or supposed liberty at stake, but their being grounded on an express conviction (of the very crime charged) by the clear verdict of a jury. Constructive guilt, the creature of the bench, will not be endured. It will make the seat of justice shake under the judge who pronounces it, I venture to foretell.

Nothing will be deemed a crime that is not found to be *wilful and malicious*. My Lord *Hale* says, that “ if A shoot *unlawfully* in a
 “ hand-gun at the cattle or poultry of B,
 “ and the fire thereof sets another’s house
 “ on fire, this is not felony, for though
 “ the act he was doing were unlawful, yet
 “ he had no intention to burn the house
 “ thereby.” And this intention the jury must judge of. So “ in trespass for break-
 “ ing a park-wall, with an intent to kill
 “ deer, the jury may find the defendant
 “ guilty

“ guilty of breaking the wall *only*, and this
 “ is a good verdict.” And whether there
 was in the act the wicked intention laid,
 the jury will for ever judge. The autho-
 rities of Lord Coke, Lord Hale, Lord
 Vaughan, and Lord Raymond, will justi-
 fy them in what they do, and so will the
 very doctrine advanced by my Lord Holt,
 in the *K. against Bear*, notwithstanding a mo-
 dern compiler of crown-law, the briefless
 Serjeant *Hawkins*, has cited it in his book,
 as an authority to the contrary. One sin-
 gle determination, in opposition to allowed
 principles, and to common sense, is of no
 avail, let the name of the judge be ever so
 respectable. A late determination upon a
 variance in libel was most certainly con-
 trary to law, where 28 and *pound* should
 have been 28th and *pounds*, and yet was ruled
 in favor of the defendant, by a learned and
 ingenious judge who could not be supposed
 to incline in behalf of a slanderer. The
 law says that any variance is fatal. But
 this means that “ where a letter omitted,
 “ added or changed makes another word,
 “ it is a fatal variance; but that it is
 “ otherwise where the word continues the
 “ same. And so it was adjudged in the
 “ *Queen against Drake*, reported by Salkeld.”
 Indeed so reasoning, without any case,
 would teach a man to expound such a gene-
 ral rule. I take notice of this recent in-
 cident, not merely for the sake of vindi-
 cating the law from any ludicrous reproach
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on such account, but to shew that a single case in a popular point, is not to be held sacred without examination; for, were it so, few names would weigh more with me than that of the person alluded to, whose works will for ever be an honour to himself, as well as to the profession itself. But modesty on first coming into office, fear of party virulence, and the hurry of an assize, may apologize for a slip in a very able young magistrate, especially where he errs on the merciful side, by too literal an adherence to rule; when a violent determination, made deliberately by a forced construction and metaphysical reasoning, in opposition to the letter and meaning of plain legal principles, and of prior adjudications by consummate judges, cannot be excused or vindicated in an old chief justice. The calling of such a determination a case in point, is treating law as if it were to be determined by the letter, and not the sense of a case, syllabically and not upon principle.

I cannot respect a grand justiciary for allowing even an outlawry to be reversed upon a silly, futile, pretended uncertainty of expression; but I should reverence him still less, if, on some other occasion, he should supply by surprize and construction a fact not found by a jury. Because such contrariant conduct would make me suspect that he would adhere literally or depart substantially

tially from any rule, as his inclination, fears, or interest might lead him.

By the way, I am told that special pleading is nearly kicked out of doors, owing to a recent discovery, that justice is much more likely to be had, when parties come to trial without the one knowing for certain what the other intends, than when both the charge and the defence are precisely set forth, and nothing can really go to issue, but what should do so; and at the trial no surprize can possibly take place of either side, or in any respect. This will, in some measure, as I should divine, prevent the ascertaining hereafter of what was in any particular instance litigated and tried, that is, one cause and determination from being a rule for another, and will of course subject more to the fancy, and discretion, both of judge and jury, and by that means, leave all our posterity more at large in their rights, than they would otherwise be, to the great satisfaction no doubt of the litigious, and to the certain emolument of the bar. Seeing therefore, that juries will amplify their dominion in this quarter, and gain to themselves the decision of many a suit, which, but for this, some legal demurrer would have carried directly to the bench and finally closed; it might perhaps be fairly expected, that juries should in return waive some of their antient privileges in other respects, and not be over-retty if any ingenious judge should, on proper occasions, be willing to

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give, nay to interpose and obtrude, by right of construction, his sense for theirs in the verdict. Reciprocity is equality, and one good turn deserves another. We shall all be *in equilibrio* again. Where then is the harm done?

When I was first entered, as it is called, of the law, soon after leaving the University, and before my father and elder brother died, I took advantage of the liberty given me to purchase law books, for furnishing myself with the best editions of all sorts of books, year after year, and by what I lately learned from a legal gentleman of my acquaintance, it was money the best laid out of any that I ever purloined under various pretences from my progenitor. For, according to this same communicative coffee-house acquaintance, there is now an absolute monopoly established in books. The proprietors of the copy, whether author, or bookseller, may print their books on the worst type and paper imaginable, and you cannot procure any other edition, it being forsooth their property as much as their stock in the funds, or their patrimony. The statute of Queen Anne, entitled “an act
“ for the encouragement of learning, by
“ *vesting* the copies of printed books in
“ the authors or purchasers of such co-
“ pies, *during the times* therein mention-
“ ed,” taking notice of the practice of you, booksellers, in reprinting books, and other writings, without the consent of the authors or proprietors, to their
“ very

very great detriment, and for preventing such practices for the future; and “ for the
 “ encouragement of learned men to com-
 “ pose and write useful books, enacted,
 “ that the author or bookseller, who pur-
 “ chased the copy of any book, *shall* have
 “ the sole right and liberty of printing such
 “ book for 21 years, from the 10th of April
 “ 1710.” Until lately it was conceived that this act *vested*, according to its title, a property which did not exist before, during the times therein mentioned, and that the part enacting such persons *shall* have the *sole right* of reprinting for 21 years, imported the creation of a future right, from April 1710, to the sole publication for the space of 21 years, which at the end of that period was to cease, and which was in opposition to, and for *preventing* the *general* right of reprinting, that every body was then in possession of. But, as this legal man told me, the whole was a mistake; however, it was excusable enough, in such a person as myself, for Mr. *J. Yates* had died of the same opinion. My friend affirmed, there was always such a thing as literary property and copy-right *at common law*, altho’ nobody had discovered it, and altho’ the makers of the statute of *Q. Anne*, having no such idea, had taken no notice of it, and had inadvertently used expressions that implied the contrary. And, if I would but think of it, I should find the doctrine to be as sound, and the proof as plain, as that of the divinity of the legation of *Moses*, from

the mention of no future state ; that I had probably heard of *lucus à non lucendo*, and of revelations *à non revelando* ; and this was clearly a deduction of the same kind. They were both modern discoveries of great wits and scholars. After this I durst not alledge the common definitions of property, or talk of occupancy, &c. the practice of all nations, the usage of our own, common sense, and the grammatical import of the statute ; but I ventured to ask, whether the power given by that statute, to certain great officers, to regulate the price of books, extended only to authors who claimed the benefit of the statute ; and whether the saving clause therein for the universities, would vindicate their printing hereafter books whose authors could be found out ? He made me no answer. Whereupon I said, that I should imagine the regulating clause as to price, could only operate upon the right conferred by that act for 21 years, for the act must merely intend to regulate the use of the property which it gave, and not to abridge any right before existing ; and if this were so, the authors who did not crave the aid of the statute, or whose books had been published for a longer time than the statute gave a sole right to their copy, might sell their books at any price ever so exorbitant, and could not be prevented, let the inconveniency to the publick be ever so great. Finding this drew nothing from the gentleman, I desired to be informed, whether the inventors of medicines,

cines, machines, bridges, painters, drawers, sculptors, architects, had likewise an exclusive right to the copy of their works. He said, no, for *distinguendum est, domine*, and then entered into niceties, far beyond those of the learned jesuit *Pascal's Provincial Letters*. Not comprehending him at all, I asked whether the invention of a musical instrument, a knife, a wheel, a lever, a pump, a ship, a compass, a telescope, a watch, &c. &c. &c. were not as ingenious, as original, as useful, as laborious discoveries by the mind, as excellent productions of the thinking, rational faculty, and as noble thoughts as those which are exhibited in the *divine legation*, the *alliance between church and state*, the notes upon *Pope*, or even the notes upon *Shakespear*, taken *accumulatively* if he pleased? Does the execution of the former in brass, iron, wood, stone, canvass, &c. render them less valuable? Is there any intrinsic preference in paper and ink? Cannot some of the most useful mechanical inventions be imitated and multiplied with as much ease as the copies of books? Is not a monopoly for 21 or 28 years a sufficient recompence to the author? *Must* his family or their assigns for ever enjoy it? The learned person exercised anew his faculties of distinguishing, but I remained little the better for what he said, and was fain to put up with the fact, being utterly incapable of bearing away the reason. The essential difference between the invention
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of the mechanist and the writer, so that one should constitute perpetual transmissible property, and the other not, I could no more apprehend, than the utility resulting from rendring either so in society. More of my senses, I thought, testified in behalf of mechanism, than of writing. However, to put an end to this jargon, I said that the printers and booksellers, who would gain so much by this determination, at the expence of the rest of the world, must be unreasonable fellows indeed, if they any longer pretended to be ignorant of the meaning of what they published and vended, and were not now always ready to answer for the contents when judicially called upon so to do. They had their *quid pro quo*. Ignorance of such property would be inexcusable. They ought to pay for the thoughts, seeing they make part of their legal estate. And, I begin to think, upon this ground it is nonsense to pretend that they don't know what is the true application of every word, letter, asterisk, or blank. The learned bench, however, must on their part, admit that these thoughts being property, and transmissible for ever, must be something in fact, and therefore, their nature and qualities may as well be submitted to the judgment of a jury, as those of an horse. Some jockeyship may be used in the traffic with either, but a clear sighted jury will not be cheated by idle pretences. It is really odd,

odd, that when thoughts have been reclaimed, like animals, from their wild nature, by being confined, and inclosed within paper and books, and have been adjudged to be private property at common law, that it should be denied that juries can try this sort of property! I do not, Mr. Almon, understand it, altho' I dare say, you do, and will for that reason be unwilling to publish what I say. However, it will do you no harm.

So many strange conceits are abroad, that I am really afraid to let out my obsolete notions. New law, new history is every day appearing; the two last things, one would think, that should produce novel-
ties, but so it is. And I read not long ago in a fashionable historiographer, that religion, law, or forms of government, were not of much consequence, the whole lay in the administration of them, and that was the best which was the best administered. For which reason I presume this celebrated writer deems it not necessary to be scrupulously exact in what concerns them. Indeed, Mr. Hume, the historian, instead of relating actions, matters of religion or politics, drawing characters, accounting for events, or representing the constitution, like all other writers before him, strives to give the whole in a different way, and having a good deal of ingenuity, has so far succeeded as to give another turn to almost every thing, insomuch that his
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history is neither the true story of this country, nor does any man of knowledge look upon it as such. It is indeed said, that new conceits with respect to law, religion, or history, are much to be distrusted; they dazzle at first sight, raise a notion of the starter, and make a noise, but generally in the end turn out mere *ignes fatui*. In law and history I confess I am for no novelties; let the modern Scottish doctors and professors of morality, one after the other, like the old school subtilizers of divinity, spin what theories they please. It is indeed indifferent to me what they may write, who am not bound to read any of them. But I shall not be passive when new-fangled legal conceits come forth in practice. I cannot willingly quit my ancient constitution and law, nor easily be persuaded that till within these last ten years we ever understood the true principles of either.

According to Mr. Hume, there was no idea of liberty in this country until the accession of his countryman James the 1st. Those who framed *Magna Charta*, or got it so often confirmed under Edward the 1st, the makers of the statute of treasons under Edward the 3d, Lord Chancellor Fortescue who wrote upon absolute and limited monarchy under Edward the 4th, Lord Chancellor More who composed the republic of Utopia under that of Harry the 8th, and all the judges of England
who

who in Queen Elizabeth's time resolved, that the *Habeas Corpus* was, and had ever been, a writ of right for every subject by the common law of England—Were persons without ideas of liberty, according to this ingenious Scotch gentleman, who I dare say does not know that we have no other Habeas Corpus law now in term time, and that the act of Charles the 2d was only to render it grantable by any judge in vacation. Had this paradoxical writer entitled his work, *Curious Relations of such English Affairs as most deserve notice, with singular Observations thereon*, nobody would have expected a complete faithful history of the whole, and every body should have read what he wrote. But as it is, it may deceive the uninformed reader, who can never learn truth from him, although he may the art of writing what is not so.

The same refined wit gave no bad specimen of his turn for the extraordinary, when in remarking upon some supposed errors of Mr. *Locke*, in his treatise of the human understanding, he coldly and shortly observed in a note, that it is probable Mr. *Locke* was led into these mistakes by the schoolmen; from whence any common reader would conceive that Mr. *Locke* had dealt much in those writers, and relied greatly upon them, whereas his principal design was to expose their subtleties and method of writing; and he every where

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professes

professes a thorough contempt of them, and teaches mankind how to get rid of the shackles they had laid upon the understanding, and fully and fairly to use his own.

This philosophical doubter, in a *Treatise on human nature*, asserts, that “ naturally
 “ speaking there is no more harm in a
 “ son killing his father, than in a young
 “ oak’s growing up and killing its parent
 “ stock ;” without ever once taking into the account that which constitutes the essential difference between them, the reason and freedom of action in the one, which the other wants. But where the love of paradox prevails, it is no uncommon thing to pass by much greater considerations than these. A sound and a subtle understanding are very different things. Who therefore need be surprized at his discovering Mr. Locke to be a loose reasoner, and Bacon no very original genius!

Pardon me, Mr. Almon, for diverging so much from my subject. I hasten to a conclusion. Many of my latter paragraphs are, I confess, very wide of my original design. But this need break no squares betwixt us. The sale of the pamphlet will not be hurt by such an accumulation of different matters; they will all serve to make a tail for flying the kite with. It will catch the eyes of more spectators, I warrant you, on that very account.

Were it indeed the custom for judges themselves to print their own judgments,
 especially

especially in new cases, (and why it is not I cannot tell) you would not have been troubled with these observations. I wish to have this made a duty of their office. At present, I am always uncertain whether what is printed be a faithful report or not; it comes with no authority, but from some private hand; and therefore I think myself at liberty to treat it like any other publication, which were the judges themselves to put it forth, I could not so well do. But until they will let us have the genuine, authentic judgment of the court, there is no great impropriety in my endeavouring to take off all weight from what is circulated as such, and seems to be exceptionable in many respects. How can the law be ascertained without some legal gazette by authority? All may be spurious, or all may be true, for what the poor layman may know. There have been several judgments given of late days, which I have wished to come at, but never could. There was one in particular in the Common Pleas about the seizure of papers, which ought to have been published, but was not, and of which I could never get even a note. None of the great magistrates of our time have printed their judgments, neither Lord Hardwicke, Lord Mansfield, nor Lord Camden; but on the contrary have prevented their coming abroad as much as they could. A single expression is frequently material. And, if what they

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pronounce

pronounce from the bench be law, why is it not to be promulgated as such for the benefit of the subject at large? Let any one look into the various reporters, and see how they differ in the relation of the same cases. In the law courts, the puny judge might certainly report yearly all the new cases. They would not be many. And after submitting them to his brethren, and their adjusting them according to their true meaning, they should all sign this annual report, and be answerable for it, and the same should be printed for the information of the world. Until this be done, I shall never treat any report with implicit reverence. And so, Mr. Almon, I wish you good night, &c.

P O S T S C R I P T.

P E R M I T me to add a word touching commitments and attachments for a contempt of court ; the late case of *Bingley* having raised the curiosity of many people and excited their surprize. It is the power and the mode of proceeding which I mean to consider, and not Mr. *Bingley* himself, who has been the publisher of all sort of libellous trash, and deserves no countenance from any man of liberal education or principle. There are many circumstances attending this summary proceeding, which I cannot square with the maxims of law or natural justice. And yet the late case of *Bingley* is singular in nothing but its termination.

I take it that any disobedience or opposition to, or misuser of, the process or orders of a court of law is punishable by immediate commitment, because no court can either maintain or execute the trust reposed in it by the constitution, without some penal compulsion on the party so offending. An attachment ought to go directly

rectly. The justice of the kingdom would otherwise stand still. Every person is interested in there being such a vindictive power. It flows of necessity from the nature of a court of justice, and is essential to it, as it could not do its duty without. This power or prerogative is therefore a necessary incident to it at common law; and there is no statute or positive law, nor any requisite, to warrant it. Wherefore if any party to a cause, officer of the law, or other person, obstruct the execution of process, or the proceedings of the court, or hinder others from conforming thereto, do otherwise than is enjoined or commanded by their precept, or forbear to do what their process, rule, order, judgment or decree require, he ought to be forthwith attached. And for this reason the old law, as cited by *Broke* from the year books, says, “ contempt shall be answered in proper person, and not by attorney.”

However, Lord Ch. B. *Gilbert* (or *Bacon* the abridger) not attending to this necessity for such power, and finding that libels were called now-a-days contempts, seems to be at a loss how to reconcile immediate attachment with the principles of the constitution, and with the grand charter, which says, *Nullus liber homo impri-sonetur, nisi per legale iudicium parium suorum, vel per legem terræ*, and therefore supposes long practice alone secures its footing in the law. He has been misled by associating

associating the lawful attachment for actual, with the unlawful for constructive contempt. The former is absolutely necessary for the maintenance of public polity, and therefore legal; the other is unnecessary, warranted by no positive law, and therefore illegal. The latter is indeed a dominion so extraordinary, so alien from the constitution of this country, and so privatory of the subject's right to a trial by jury for every misdemeanour, that it clashes with the whole system of our law. Without an immediate power of coercion, where process is resisted, the courts could not go on. But in all other cases no punishment can be inflicted but through the medium of a jury. With respect to courts martial, &c. they derive their existence from statute, as well as the standing forces which they controul. There is indeed in *Fitzherbert's Natura Brevium* no mention of any attachment but for the furtherance of justice and the restraint of injustice, which could not be if the use of it now contended for were either common or legal. However as opposition to process implies contempt, and a despising of the authority and dignity of the court from whence it issues, this may have given rise to a notion that every thing which betokens any slight or disapprobation even of the ways of reasoning or demeanor of any judge, is likewise a *contempt of the court* within the meaning of the law by that term, and will enable them

to

to attach a party guilty thereof, although such slight or disapprobation of their sentiments or conduct be expressed merely in discourse, or in some publication of the press, and does not actually interrupt or disturb their judicial proceedings. But this, I apprehend, is a gross mistake, and an abuse of the power of attachment, which is permitted to them from nothing but absolute necessity. Upon that score alone this penal authority begun, has been practised, and can be established as part of the law of the land. For, “ it shall not
 “ lie in any one’s power to defeat the
 “ rules of a court of justice, or to render
 “ them ineffectual; nevertheless the con-
 “ tempt must be certain, and not doubtful;
 “ for else a party may perchance be
 “ wrongfully committed, which the court
 “ will be cautious not to do.” In three words, a contempt of the court means some efficient contempt of the law, that is, a withstanding of its process, and not an idle contempt of the persons, understandings, or demeanor of its temporary officers, expressed out of court and merely in words, whether written or unwritten. It is the defeating of the proceedings of the national courts, by an assault upon the judges, parties, or juries, or by raising such a disturbance as to prevent justice being fairly and soberly done; or else the defeat by some means or other of their process. And it is nothing else.

The

The supposing of a man to be amenable by attachment for any constructive contempt which does not impede legal proceedings, is as foreign to the idea of this constitution, as the supposal that a man can be bound to surety of the peace for any thing (before judgment) but actual violence; that is, for any constructive breach of the peace. They both proceed upon the same principle; the absolute necessity of something being done immediately; the one for the prevention of interruption to national justice, the other for the preservation of the lives and properties of individuals. The great prevailing luminary of the law, in his present perihelion, ever looking at the principles of things, will not (I trust) disesteem this way of reasoning. Indeed, I should guess he would treat the notion of considering any penman, printer, or bookseller (under the arbitrary denomination of a libeller,) as an actual breaker of the peace, or as an actual contemner of the court, as a delusion, *vox et præterea nihil*; and would tell the person who should argue to that end, and desire an attachment, that there was no force, or violence in either, but what was the work of fancy, a mere *lusus* of the imagination. It is indeed only by construction, and as having an evil tendency, that the one is styled a breach of the peace, and the other a contempt of the court, in the track of legal discourse. The man who writes abusively,

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intends

intends, perhaps (though I believe rarely) to create some public disturbance ; and he who traduces, reflects upon, or calls in question the justness of any judgment, may be supposed to aim at diminishing the authority of the court, or of the persons of its judges ; but not being immediate outrages, or the use of force, either to subdue any individual, or to withstand the execution of any law, they do not require instant suppression, and may well wait for a trial by jury, whose business it will be to consider both the tendency and intent of the arraigned words or writings, and to pronounce whether the same be advised, malicious, and contrary to the peace of our lord the king, and the good order of his realm ; or no more than pertinent and just remarks on the errors and malefeazance of his political ministers or law-magistrates. In general they are the products of hackney writers for the sake of a livelihood.

There cannot be a juster definition of a *contempt* than my lord *Coke's*, which says, “ this word is used for a kind of misdemeanor, by doing what one is forbidden ; or not doing what one is commanded.” And by old judge *Croke's Elizabeth*, it appears that, “ one may be imprisoned for a contempt done in court, “ but not for contempt done out of court, “ or a private abuse.”

I much doubt whether this proceeding by attachment for a constructive contempt
of

of the court be very antient ; I mean for writing or speaking degradingly, irreverently or contumaciously of their persons, or their judicature. My lord *Vaughan*, in *Busbell's* case, takes notice of two or three cases ; but I think one may gather from what his lordship says, that he must have adopted our notion, or he would otherwise scarcely have approved what was done therein.

“ One *Astwick*, brought by *Habeas Corpus* to the King's-bench, was returned to be committed *per mandatum Nicolai Bacon militis, domini custodis magni sigilli Angliæ, virtute cujusdam contemptus in curia cancellarii facti*, and was presently bailed, the return being too general.”

“ One *Apsley*, prisoner in the Fleet, being brought up on *Habeas Corpus*, was returned to be committed *per considerationem curiæ cancellar. pro contemptu eidem curiæ illato*, and upon this return set at liberty.”

Lord *Vaughan* says, “ in both these cases no inquiry was made, or consideration had, whether the contempts were to the *law court*, or *equitable court of chancery*, either was alike to the judges ; lest any man should think a difference might arise from thence.”

“ The reason of discharging the prisoners upon those returns was the generality of them being for *contempts* to the court, but no particular of the contempt

Y 2

“ exprest,

“ exprest, whereby the King’s-bench
 “ could judge, whether it were a cause for
 “ contempt or not.”

“ And was it not supposable, and much
 “ to be credited, that the *Lord Keeper* and
 “ *court of Chancery* did well understand
 “ what was a contempt deserving commit-
 “ ment, and therefore needed not to be re-
 “ vealed upon the return ?”

The same Chief Justice, in the same re-
 port, mentions likewise the following case,
 which very strongly confirms what we have
 ventured to advance.

“ *George Milton*, imprisoned for con-
 “ tempt, scandalous words of the court, and
 “ convicted of *drunkenness*; the causes were
 “ resolved to be insufficient, and therefore
 “ *dimittitur à prisonâ*, and the goaler dis-
 “ charged of him ; but he gave bail to at-
 “ tend the pleasure of the court.”

My doctrine is still corroborated by the
 case of “ *William Allen*, who was brought
 “ up from the fleet on a *habeas corpus*, and
 “ the warden returned, that he was com-
 “ mitted *per T. dominum Ellesmere domi-*
 “ *num cancellarium pro contemptu in non per-*
 “ *formatione cujusdam decreti in eâdem curiâ*
 “ *facti*, 3 Feb. anno 11 regis, nunc in causa
 “ *adtunc ibidem dependente inter E. Wood,*
 “ *querentem & dictum Allen def.* And on
 “ this return the court refused to deliver
 “ him.”

These cases happened in the reigns of
Queen Elizabeth, and *James the 1st*, and
 are

are to be met with (excepting *Milton's*) in Serjeant Moore's reports,* where are several instances of persons delivered by the K. B. who had been committed for contempts of decrees, and orders of the privy council and court of requests. From whence may be collected how strict the K. B. then was in requiring a specification of the contempts, for which the commitment had been, that they might judge thereof.

There are some strange instances of commitment by the Court of Chancery, in the case of marrying infants, which perhaps would not be deemed a sufficient cause by the courts of law, if returned on a *Habeas Corpus*. There is one in the case † of a girl married without consent of her guardian, although such guardian was not appointed by the court.

The Chancery exercises this power, not on bill only, but on petition, as being the delegate of the king, who, as *pater patriæ*, is said to have the care of all infants lodged in him; and, in committing the offender, they imitate the courts of law, which under the old writ of ravishment of ward, took cognizance of this offence, and inflicted commitment as a part of the punishment, that is, they pronounced a sentence of imprisonment. And trespass or ravishment of ward is the proper legal suit for the purpose, and is the mode of obtaining
remedy

* Moore 839, 840.

† 2 Wms. 112.

remedy, prescribed by the statute of the 12th of Charles the II. which was drawn by Lord Chief Justice *Hale*. However, when a similar application was made to Lord Chancellor *King*, he said “ the infant girl never
 “ having been under the care of the court,
 “ nor committed by the court to the custody of the defendant, I do not think
 “ this an immediate contempt of the court;
 “ but then it is a very ill thing in the guardian to marry this child to his own son,
 “ and punishable by *information*; and I will
 “ have this guardian bound over with sureties, to appear and answer to an *information*
 “ to be exhibited by the attorney general against him; and let the child be
 “ delivered over by this knavish guardian
 “ this afternoon, or *otherwise* to stand committed.” † A very sensible order, as it seems to me, and consonant to the law.

But all these cases go upon the principle of that contempt, which is a real resistance to the orders of the court, in actually taking away the infant, who is either specially its ward, or otherwise is regarded as such by the police of the realm. This abduction, or seduction, therefore is an actual violence done to the general law of the kingdom, which the king (by his Chancellor) as father, guardian, and conservator of all infants, is compelled to put an immediate stop to.

In *Lilburn's* case,* the proceedings were cancelled by parliament, and pronounced to

† Wms. 562.

* See Rushworth.

to be illegal; and yet he certainly had printed and published in defiance of an *order* of the court of Star-chamber. My Lord Chief Justice *Holt*, in the *Queen against Langley*, said that “ words *contra bonos mores*, spoke
 “ of a magistrate *in court*, is a contempt
 “ for which he may be fined.” Whether he means by the summary method of attachment is not clear, but, if he does, his meaning must be, provided the words were spoken of him, in his presence, whilst sitting in judgment, so as to be an actual interruption to the proceedings of the court.

I question whether the practice of attaching for contempts out of court by writing, or otherwise, can boast many precedents; but whether it can or not, it appears to me to be contrary to the spirit and genius of our legal frame. No instance occurs to myself prior to that of † Wyatt, the bookseller, for publishing a *Latin* libel. He said he did not understand *Latin*, and named his author Dr. *Middleton*. Whereupon an attachment was moved against the Doctor, for writing a libel on *Bentley*, a doctor of divinity in the University of Cambridge; in a *Latin* preface to a book about the library of the University; dedicated to Dr. *Snape*, then Vice-Chancellor. *Middleton* came into court voluntarily, and confessed he was the author, which being recorded, he was fined 50*l.* and ordered to find sureties for his good behaviour. This I have
 read,

read, but without knowing to this moment upon what legal bottom such a case can be supported, and yet I state it from the report of a judge of the court, at the time;* and conceive that the said publication contained likewise a libel upon the court of King's-bench, although Lord *Fortescue* has omitted to state that material circumstance.

If this be the first case, the practice is not immemorial, and little in my humble opinion can be for it.

There is no positive law for attachment pretended: It is grounded on nothing but the right inherent in all courts, to punish for a contempt of their authority, by immediate commitment. And the very reason of the thing shews, that this contempt must be a resistance, in fact, of its authoritative mandates, so as to prevent its doing justice through the kingdom.

As the life of a man, or his property, may be destroyed by an actual breach of the peace, so the being of a court of justice ceases the moment that its authority is baffled; and therefore, in both cases, force must be immediately had recourse to in order to suppress counter-force. The vitals of a court, an individual, and property, if in imminent danger, must be instantly secured *monu forti*.

The vulgar sense of the word contempt, has created the confusion. All contumacy of, or contumely upon the person, expressions

* *Fortescues Reports*, 210.

expressions and sentiments of a judicial officer and magistrate, by word of mouth or writing, is in common parlance a contempt; but it is no actual withstanding or defeating of the proceeding of courts of justice, to which the name in a legal sense is applied, and for which alone an attachment should go. Nevertheless, every undue disparagement with tongue or pen of the public tribunals, or the men that fill them, I wish to have punished. It is, if any thing be, the proper object of the information *ex officio*. In God's name, let the treatment of any judge, or of any judgment, with causeless banter, satire, scorn, reproach, or ignominy, and the libelling or calling of either needlessly in question, be scourged with this bitter rod of criminal vengeance. But the supposed offender, should not, nay cannot, be deprived of, or punished without, his trial by jury. The detention of a libeller in prison, indefinitely, under the colour of contempt, without having passed sentence of imprisonment, is I conceive illegal. His offence, if proved to the satisfaction of the jury, upon indictment, information or action, deserves to be highly punished. But, as it does not stop the procedure of the justice of the kingdom, it is not like an assault upon the court during a trial, the repulsion, elusion or destruction of process, a fraudulent use of, or the prevention of obedience in others to it. And, therefore, no reason

ex necessitate rei, can be given for a departure from the constitutional mode of pursuing such, more than other affronts, unless it may be by appropriating the information *ex officio* to this special purpose, because judges conduct ought to be more irreproachable than that of other men. If the libelling of them be more pernicious, let the punishment of those convicted fall the heavier. But these, in my opinion, will be distinctions enow. Besides, there is a weighty objection against the exercise of this power of attachment by the court, where national justice can go on without it, which is, that the court libelled will be party, prosecutor, and judge; three characters that should not meet, where it can be avoided. The frailty of human nature will bear me out, in saying, that under such circumstances the judicature cannot be impartial and indifferent, which is the first requisite in the exercise of criminal jurisdiction.

Is it not, moreover, possible that judges may so execute their offices, as to raise just apprehensions of their turning the law to the oppression of the subject, especially in crown-prosecutions; and that their ways of compassing this may afford justifiable grounds for animadversion, and for the controverting of the constitutionality of their adjudications? The remarks of Sir John Hawles upon several state trials, prior to the revolution, were thought to be most material and just: they were of great service

vice at that period, have since been constantly printed in the collection of state trials, and tho' very severe, are not deemed any abuse of the press, but a true use of it.

Where what I do does not in fact interrupt or disturb the proceedings of a court, I will deny the legality of its power to attach me. No judge has a right, by that terror, to shut my mouth, or to prevent my pen from censuring what I think erroneous in his distribution of public justice. At the same time, no man reverences the present set of judges more than myself, sincerely believing, that few periods of time have produced men of more science upon the bench, of more integrity or understanding, insomuch that it would be difficult to make a change for the better, unless you could pick out another *Wates* from the bar. I honour their offices as the most beneficial of all to a free state, and therefore think they should be, if they are not, rendered worthy the acceptance of the first men in the profession. Nevertheless, I will never subscribe to the putting them above the inspection of their country. Power and authority, without check, may induce men of honour to be more arbitrary than they should be; and I can easily imagine, that very extraordinary men may be possessed of prerogative and aristocratical notions, which may be extremely pernicious to such a common-wealth as ours. If

they can introduce and establish for law their own ways of thinking, by solemn judgments from the bench, the most dangerous *dicta*, may, when secure from the revision of the public, become by time respectable and venerable, and be hereafter alledged as precedents, and the real established law of the realm. Let no man, therefore, whilst a parliament subsists, submit to be attached, at the will of any court, for having merely been guilty of contemptuous writing, and have no alternative left, but that of answering their interrogatories, or being imprisoned as irrecoverably contumacious for life. Unless such person has withstood their process, and *actually* resisted their legal authority, let him not, without making complaint to the commons assembled, be attached at all, for a moment. No constructive denial of their authority, dignity or uprightness, will be a warrant for such attachment. Let them proceed by due course of law, and put the presumed malefactor upon his trial, by information; no man should be above controul, or out of the reach of punishment, in some way or other.

I have been the more large upon this head, because it is said, that attachment is a process which issues at the discretion of the court.

Having said thus much, to evince what I take to be the contempt, for which an attachment is solely warrantable, I shall
 now

now take the liberty of considering cursorily the mode of proceeding under it, wherein are some things, which I cannot reconcile to my legal notions.

It may be awarded by the court, it is said, upon a bare suggestion, their own knowledge, or upon affidavit, without any appeal, indictment or information, and may be executed on a Sunday. The party served with the writ, must enter into a recognizance to appear at its return. Indeed, if the offence be done in court, and appear from confession, view of the judges themselves, or examination, the court may record the crime, and commit the offender directly for judgment. But there is usually no more than a rule to shew cause, unless the contempt be of a flagrant nature, and positively sworn to; in which case the party is ordered to attend in person, as must every one against whom an attachment is actually granted; and if he shall be apparently guilty, the court in discretion will either commit him immediately, in order to answer interrogatories, to be exhibited against him, concerning the contempt complained of, or will suffer him to enter into a recognizance to answer such interrogatories. If he fully answer, and can swear off the contempt, he is discharged, and the prosecutor may proceed against him for perjury, if he see cause. Ignorance of the law, will be no justification of any illegal act, but may be offered in

in mitigation. If he deny part of the contempts, and confess others, he shall not be discharged as to those denied, but the truth of them shall be examined; and if his answer be evasive, as to any material part, he shall be punished in the same manner, as if he had confessed it.

The court, it is said, will not now bail a man taken up for a contempt, unless he give security to answer interrogatories.* Formerly, the parties own recognizance used to be thought sufficient, but of late years two sureties have been insisted upon. The interrogatories must be tendered to him within four days, or he may move to be discharged. But, by the practice, they need not be filed, till so long after sureties given, unless the party be in custody, when no security at all is requisite.

With respect to courts of equity, it is said, that *the chancery* never suffer persons to be examined on interrogatories to bring themselves into contempt. But, where a contempt is expressly sworn against them, will give them leave to be examined by way of purgation, on personal interrogatories, in order to clear themselves.† Indeed, if the contemnor deny the contempt, the prosecutor may take out a commission to examine witnesses to prove it, and the contemnor shall be permitted to name no more than one commissioner, not to examine any witnesses at large for himself,

* See *Barnardiston's* reports. † See *Moseley's* reports, 259

self, but be confined to the cross-examination of the prosecutors. On *proper* affidavits indeed, the court will indulge the contemnor with the liberty of examining witnesses to particular points. However, my Lord Chancellor *King* declared, he thought the rule very hard, and as the prosecutor might examine one in contempt on interrogatories, he ought to be content with his oath. *The Exchequer*, in cases of very great contempt, where a party is examined on interrogatories, and denies it, have given liberty to the prosecutor to examine witnesses to *falsify* this denial.*

The courts of equity, therefore, are less merciful to a supposed criminal than the courts of law, where no testimony is received to falsify the examination of the party; and, in truth, Lord *King* might well stare at such a practice obtaining in chancery.

The recognizance, security, fine, and imprisonment in *contempt*, are all at the discretion of the court, that is, *secundum discretionem boni viri*. And to the question *Vir bonus est quis?* the answer says, *qui consulta patrum, qui leges, juraque servat*. But, by what we have seen, there is no precise rule in the case, and the whole is pretty indeterminate, not only the punishment, but the evidence and the examination. Now, according to Lord Chief Justice *Camden*, “ Discretion is the law of
“ tyrants,

* Bunbury's Reports, 244.

“ tyrants, it is always unknown; it is
 “ different in different men; it is casual,
 “ and depends upon constitution, temper,
 “ and passion; in the best, it is oftentimes
 “ caprice; in the worst it is every vice,
 “ folly, and affection, to which human
 “ nature is liable.” For my own part,
 being one of the people, I adopt the no-
 tion of the old Romans, who (according
 to Tully) said, *populariter loquendo lex est,*
quæ scripto sancit quod vult, aut jubendo aut
vetando.

This English inquisition is carried on
 much like the foreign. For, the defen-
 dant having entered into a recognizance,
 and giving sureties to answer interroga-
 tories; so soon as they are prepared he is
 served with a written notice of the time,
 place and person he is to attend, in order
 to be examined; but he is not suffered to
 take a copy, nor indulged with a sight of
 the interrogatories previous to his exami-
 nation, and no counsel or solicitor is ad-
 mitted. However, the defendant, thus
inops consilii & ore tenus, may, if sharp and
 learned enough, demurr to such interroga-
 tories as are leading, improper or imperti-
 nent. For there is no way but to answer
 or demurr.

When this scene is closed, the curtain
 draws up, and he is brought before the
 master, with the interrogatories and depo-
 sitions, and may have copies of both, and
 counsel and solicitor. The business of
 this

this officer is to report the whole matter, the refusal or answer, with such other particulars as he shall think fit. And upon his report the court proceed to judgment.

In *North* against *Wiggins*, an attachment was moved for at once against the defendant, for abusing the officer who served the process upon him, and for speaking contemptuous words of the court. But a doubt arose whether the rule should be absolute, or only to shew cause, where the words are sworn to by one person only; the rule in *chancery* requiring two affidavits, to deprive the party of the benefit of shewing cause. Whereupon a supplemental affidavit was filed, and the point not determined. However, Lord Chief Justice *Hardwicke* said, “ he should be unwilling to establish
“ a practice, that would put it in the
“ power of one hardy man to hinder an-
“ other of an opportunity of defending
“ himself, before he was restrained of his
“ liberty.”*

The Court of King's Bench, when Lord Chief Justice Holt was at the head of it, ruled, that “ there ought to be no interro-
“ gatory leading to a penalty.”† But in the “ *K. against Barber*, the defendant
“ having presented a petition to the com-
“ mon council of London, reflecting on
“ an alderman, and having used con-
“ temptuous words of the Court of King's
“ Bench, an information went for the
A a “ alder-

* Strange, 1068.

† 12 Mod. 499.

“ alderman, and an attachment issued for
 “ the court. By the interrogatories the
 “ defendant was asked whether *he* did not
 “ present such a petition, and use such
 “ and such words? Whereupon he moved
 “ to have so much thereof as related to
 “ the *presenting* struck out, because it was
 “ making him accuse himself of that which
 “ would convict him of the libel. And
 “ the court ordered that part to be struck
 “ out, and said he was not obliged to
 “ answer it, *but he might be asked whether,*
 “ *when the petition was presented, he did not*
 “ *say so and so.*”† From whence I should
 collect, that the court being no ways in-
 terested in the abuse upon the alderman,
 would not be ancillary to the furnishing of
 evidence on the information; which would,
 however, be the case, if the defendant con-
 fessed, in his deposition or examination,
 his having uttered written scandal, for none
 other could be *presented*.

They permitted, for that reason, this
 interrogatory to be suppressed, but took
 care to pronounce, that he might be di-
 rectly asked as to his speaking of the con-
 temptuous words, which he was accused
 of having vented against the court, at the
 time that such petition was presented;
 leaving the proof of whom it was pre-
 sented by to another examen. The court
 charged him with contempt of them by
 speech only; therefore the proof of that
 was

was all they wanted for punishment, and accordingly declared their opinion, that he might be interrogated *as to that* point blank, which seems really to me to be *an interrogatory leading to penalty, and which ought not to be*, by the rule above laid down. But thus it is, and always will be, when the party interested (no matter whether from pride, love of power, resentment, or money) is to judge in his own cause, there is no measure observed. And in truth, to what other end any interrogation, as to the crime charged, should be *forced* upon the defendant in any criminal matter, I cannot conceive. Unless he be asked to things leading to the conviction of himself, that is, to a penalty; I see not of what use such examination would be to the prosecutor or accuser. It must be the most nugatory of all things. For which reason, to speak the plain truth, this questioning insisted upon by the court in *contempt*, is always to make a man accuse himself, contrary to the unanimous voice of the laws of England, from the beginning of time down to the present: it is not, it cannot be in favour of him, or by way of letting him purge and purify himself; for, if it were, it would only take place when requested by himself. Indeed by what all the books say, this interrogation was introduced for the defendant's own purgation or purification, somewhat upon the same principle with the old wager at

law. The judges constantly declare it is meant as a favour to him. And that it was originated for this purpose, I have not the least doubt. But as managed at present, it is a downright inquisition, and the most costly favour that can be pressed upon a man. It is, in the lingo of the streets, being deadly good; and, in the language of gentlemen, infamously nonsensical.

Very little reflection will establish, I think, to every man's conviction what is advanced. All the world know, that by our laws no man can be *bound* to accuse himself; now, if a libeller, or constructive contemnor of the court can be attached, and forced to give surety for answering interrogatories, or be committed in default thereof to the bonds of a prison for life; and these interrogatories not only may, but must tend to his conviction, if answered affirmatively; I think the necessary conclusion is, that a man in fact can be bound to accuse himself, although by law it is forbidden.

Is it not then, with respect to the law of interrogatories, the true exposition (which is said, as before-mentioned, to be the rule in chancery) that it never suffers persons to be examined against their will, *to bring themselves into contempt*; but, where a contempt is expressly sworn against them, and they desire it, the court will give them leave to be personally interrogated to clear themselves. In such case, the questions cannot

cannot be too direct, leading and pointed. He has waived the law in his favour, hoping and trusting he shall be a gainer thereby. *Volenti non fit injuria.*

I have no authority for saying, such will be the construction of my lords commissioners; but I am quite sure it will be that of common sense, the old friend of their friend my Lord *Mansfield*, who has never avowedly departed from it, but for the sake of reversing Mr. Wilkes's outlawry, (which was at worst but a kind sort of treachery) and then his lordship took the trouble, in a memorable introductory speech, to declare, that he was free from fear; although the audience, it must be confessed, was very numerous and formidable in its appearance, the cause a little ticklish, and the panegyric upon his own fortitude somewhat extra-judicial and irrelevant to the matter before the court, as well as absolutely uncalled for by the merciful judgment he was resolved to conclude with. It was in truth a mere oratorical excrescence, if I may be permitted (*pace tanti viri*) so to say. *And now I most cordially* beg pardon for being so eccentric myself. *Petimus damusque vicissim.*

I have heard some common-rote lawyers talk of this extortion of an answer to interrogatories, under pain of perpetual imprisonment, as analagous to the forcing of a criminal at the bar, to hold up his hand and plead, under pain of being pressed to death.

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The pressure, or penalty, I confess is not much less afflicting; but I deny the similitude, unless the party be forced to plead guilty, or upon his oath to declare he is not guilty; neither of which particulars did I ever yet see, or hear any example of in this country. On the contrary, all judges use, as it were, a gentle sort of force, to induce every prisoner, or defendant, to say he is not guilty. No oath is required, and the English law abominates the idea of pleading under such a possible torture to the conscience, in any criminal proceeding. These short-sighted lawyers then say, the imprisonment is not for the original contempt, but for the subsequent one; and *that* surely is an actual resistance of the court; and the commitment is not for life, but until compliance with the rule and order of the court. This is a most ingenious vindication, and would have some weight did it not proceed from *petitio principii*, the begging of the very question in dispute, which is, the right of the court to make such rule or order. And therefore until that right be made out, I shall not make any answer to such followers, bullies, and bravoës of so truly impertinent a beggar, however sturdy in mien.

The court professes the examination to be instituted as a favour to the defendant; if it be so, it is not of strict right, and if the person to be indulged does not desire it, but protests against it, what pretence can there be for its taking place? There is
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really much good sense and humanity in the institution itself. It is the abuse of it which is alone to be complained of. For a party may *prima facie* appear to have done something designedly to prevent the execution of justice, and cannot bring proof to exculpate himself. He therefore sues to the court, as for a favour, to be permitted to swear to his own innocence. The proof of his supposed guilt not being conclusive, the court think it not unreasonable to admit of this self-purgation, provided he will submit to be examined by their own officer, *ore tenus*, on such interrogatories, as he in conjunction with the prosecutor shall advise. All this is fair, equal, and just; and he has no right to ask beforehand for a sight of their questions, in order to contrive answers. But, the practice that has of late years obtained (in consequence of so merciful and wise an original ordonnance, in cases not self-evident,) is carried to a degree of oppression, that makes all mankind startle at the possible consequences. Instead of letting a defendant, who craves it as a mercy, be at liberty to exculpate himself on interrogatories; every defendant is now compelled to a personal examination; and, if he obstinately resist, to a prison, to last during his rebellion. A true sense of this has drawn the courts into the most ridiculous dilemmas at times. The very mobility are not so blind as not to see what occasioned the contemptible upshot of the proceedings
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in your case, Mr. *Almon*, some years ago, and in that of *Bingley* very recently. And such will ever be the disgraceful retreats and repulses of rash and inconsiderate falliers beyond the ramparts of the law, whenever a true manly defence and resistance are made, upon the sound bottom of the constitution.

Where the law of the land protects every man from accusing himself, what is it less than tyranny, under the guise of jurisdiction, let it be supported by whatever usage it may, to force any one to answer upon oath to interrogatories, which he cannot perhaps do without affording proof for his own conviction? I call it force, because if the culprit does not comply, he is imprisoned for his contempt of the court in not complying; and so he must remain until he purge this contempt, which can be done by no other way than by answering. If this be not the being put to torture, or to the question, as foreigners call the rack, I know not what is. There is no solution to the original absurdity of forcing a criminal to do what tends to the condemnation of himself out of his own mouth; the setting about it involves us only in a circle of absurdities, of which every successive one seems to be the greatest.

The obvious just procedure is this. When a person is summoned, or laid hold of for contempt, he should be informed of the particular contempt, for which he has drawn

drawn upon him the hand of the court, and asked whether he chooses to be admitted to clear himself on interrogatories, or what other defence he can or will make. If the case be not such in its own nature as can admit of no defence, and he declines being examined, the court may fix a day for hearing such defence, and commit him, or not, in the mean time, as they shall see fit, or as the want of sureties may render expedient; and when the day comes the court ought to enter into the enquiry, and determine as the merits of the case shall require. If it be a favour, the court may, or may not accord that favour, to let him have an opportunity of clearing his conduct by his own oath, in answer to such questions as they shall think fit to put to him. If the case be such, that they think he is not entitled to that indulgence; or if he is afraid of the consequences of such examination, being conscious of his own guilt, and therefore craves no such indulgence; there is an end of that matter. When the contempt has passed in view of the court, there can be little hoped from such examination, and no great occasion for it, unless there be a possibility of its not being wilful. An affidavit of his circumstances may mitigate his fine. If the charge be grounded on affidavits, he will probably be permitted to defend himself by affidavits. But in whatever way the thing be put, the court should come to

judgment upon it. If the party reject the offer and chance of self-exculpation by interrogatories, and has no evidence to produce in his behalf, his fate must be determined by the strength and proof of the charge against him. Should he pray to be received to purify himself upon his own oath, no interrogatory should be liable to his objection but one that tended to make him accuse himself of some other crime; it cannot be too pointed, personal or particular, to any part of his own conduct, for which he then stands arraigned, and which he has no other means of clearing than his own oath. But, if he be fearful of such rigid examination, as, if really guilty, and a man of conscience, he may well be, and therefore declines it, nothing can be so ridiculous as the forcing him to it out of kindness, unless it be the pretended goodness of priests, in putting men to the wheel, in the fire, or on the gibbet, *pro salute animæ*, or in order to save them from damnation and hell flames. You are a heretic, come and confess your sins, that I may inflict suitable punishment upon you; if you do not, I will put you to death for not confessing them; I act out of regard to your own soul.—This is the language of the sanctimonious inquisitor. The legal questioner says, I have seized you because you are a defier or breaker of the law; submit to avow upon oath your crime, that I may have indisputable ground
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for proceeding to some penal sentence against you ; if you do not, I will confine you to a prison for the rest of your days ; it is from a principle of mercy that I proceed throughout. The penance layed by the church, or the penalties by the King's-bench, are not of great estimation in making up this account, but the ground for the proceeding seems to be of the same stuff.

In *Lilbourn's* case, the attorney general, if I remember right, seeing the defendant refused to be interrogated upon oath, prayed the court then to proceed to judgment without. And this was a proper step. There need be no suspension of justice in such event. I forget now what happened in your case Mr. Almon. There was some blunder, I believe, in the title of the affidavit ; and the court not caring for any further proceeding in so clamorous a business, took advantage of that circumstance to let it drop. In the *K. against Bingley*, the defendant was obstinate, and would not be examined ; the consequence of which was, his being committed to prison for his contempt, in not submitting to be examined, and there lay for two years, till the crown thought the matter might by and by occasion some serious complaint, and therefore he was let out, in the same contumacious state he had been put in, with all his sins about him, unanointed and unannealed. If my memory does not fail

me, there was some coquetry between the court and the attorney-general, upon this very article, about who should undergo the ridicule of letting him escape. Mr. Attorney, tried to put it off upon the court, by telling them, upon his being brought up, he had nothing to pray against him. The sagacious and noble lord who presided, smelling a rat, or knowing there was one, was not to be so taken in, and therefore asked, what it was Mr. Attorney had to ask of the court; to which Mr. Attorney said again, he had merely informed them, that the defendant *Bingley* was there, and that he should move nothing further about him. After a little pause, and a recovery from the inertness of this answer, the chief at last let him know, that if he moved nothing, nothing could be done, and every thing would remain as it was, the consequence of which was, that the defendant would still be in custody; the court never acted from itself, but upon motion from without. Mr. Attorney, finding it was in vain to be wasting more time about who should do what was agreed to be done, in a very manly manner, took the thing upon himself, and said, then I move that he may be discharged. And thus ended, in this pitiful manner, this paltry business; and yet perhaps it was, all things considered, the best way in which it could be put an end to, disgraceful as the mode must be, to the real as well as apparent prosecutor
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of it, and let down as government could not but be by such a desertion of its object. The only gainer, was a shabby pamphlet-seller or stationer, who fattened and throve upon the reputation of patriotism, by being in prison under the pretence of it, and who wished for little more than to be translated from the King's-Bench prison to Newgate, that is, from the borough to the city, or from the rear of the army, to the head quarters; and was pretty indifferent about his personal liberty, provided his press moved freely, and found a large vent for his productions.

However, I cannot here help observing, that altho' I have ranged the last three cases together, yet I mean not to have them confounded, as of the same nature. That of *Lilbourn* went upon the charge (whether true or false matters not at present) of an actual contempt of an order of a legal court, and therefore had a bottom, which the others had not, as being in support of that courts orders, which had been in fact infringed by the defendant. But the two latter were for libels, which, by a criminal construction only, were deemed to be written in ridicule of, and *therefore* in contempt of some legal adjudications, or of one of the judges of the King's-bench; as what is said in diminution of one judge has (I am told) been construed to be in degradation of the whole court, that is, of all four judges, by virtue of an arithmetic peculiar

culiar to Westminster-hall. Now, libels, or defamatory expressions out of court, upon what hath passed in court, are no let or hindrance to the process of the court, or to national justice ; they do not break a spring, clog the wheels, or stop the vibrations of the juridical machine, either in or out of court, and therefore do not necessarily require instantaneous remedy. Nothing but absolute necessity can warrant commitment before trial by a jury, the right of every man by *Magna Charta*. Actual breach of the peace, and actual contempt of law proceedings vindicate upon that principle such restraint. No other offences do, and least of all those committed by writers. The persons abused by them are likewise of all mankind the last who should judge them. The reason alledged for attaching them, and for not calling in their country to try them, is the very reason for it, namely, its being a public offence ; for who can be so concerned to have it punished ? But, if after all, this power of attachment can be vindicated in constructive trespasses and contempts, contrary to the fundamentals of the constitution, and to *Magna Charta*, without necessity, and without constant and uniform usage, it is utterly inconceivable how a freeman, accused of a misdemeanor, should be forced, under the pain of perpetual imprisonment, to answer upon oath to interrogatories, tending to make him accuse himself. That they do so is evident, for unless

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the answering them one way would convict him, the answering them the other way could not clear him ; the affirmative must do one in the same proportion that the negative does the other. And, as the Irishman would say, is it not still more inconceivable how this should be done out of favor to him ; how the enforcers of this interrogation, under such a dreadful penalty, in opposition to the most fervent deprecation, can call it indulgence, and a mere act of mercy !

The humanity, the sense, and the law of the proceeding, are equally sound. And if such reasoning be the effect of one science, or of the seven, an ounce of mother wit is preferable to them all. Indeed ever since the promotion of a learned chief, who is for resorting to common sense, and the principles of things, I have been less inclined to put up with legal nonsense than ever. Forms must be matters of positive institution, but judicial determinations require rational grounds. I follow my great leader therefore in the latter, and try his own steps by that test, not instantly scouting a case, because it is old, but diligently searching after the principles upon which it is built, from a fearfulness of passing over some excellent foundation, and an unwillingness to unhinge the whole law of my country, by precipitation, and too strong a prepossession in favour of my own understanding, finding there was some sense, as well as some honesty,

nesty in the world before I was born ; and gathering from experience, that nothing is so material to the subject, as to have the law for his person and his property known or settled. I am therefore for originating no new principles, but for judging present cases by the principles, and not by the casual terms and expressions, of the past. In matters of practice, or forms of proceeding, I am for adhering most scrupulously to the rules of my predecessors, lest by departing from them I should at my own departure leave no rule at all. Thus it comes about, that if I were a privy counsellor, I should not think of sending a case from that board to the King's-bench, (especially were I the chief justice of it) for their opinion, unless I found some precedent for so doing ; as I should rather deem it pragmatical to introduce so important an innovation into the state upon my own single authority ; and yet whether in some cases it might not be done with good effects, I have my doubts ; although were I to venture upon such bold regulations, I would much rather be for transferring the whole judicature on appeals from the colonies, to the House of Lords, like those from Ireland, in order to let all *British* subjects see that the majesty of this government, in its dernier resort, rested in the parliament, and the supreme council of the nation. But whigs and tories, whether in or out of ermine, will upon these points differ upon principle, and being but a small

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man myself, it becomes me not to preach as it were, *ex cathedra*, especially of mighty personages at the head of affairs, invested with the paramount judicature of the whole realm, and the dispensation of all the law, both ordinary and extraordinary, criminal, civil, and political, throughout the vast English world. After these pompous ideas, I cannot submit to talk of the King's Bench, the Chancery, the Privy Council, or even of the House of Lords, and therefore I will have done. But do not stare at my jumbling so many jurisdictions together. Things are sometimes strangely connected. Did you never hear *qui facit per alterum facit per se*. It is nothing to me whether enormous vanity, high church principles, ambition, or private interest, sway men most. I do not like to have any man conceit himself wiser than the whole world besides, for, being a dealer in scraps of Latin, like other old fellows of the last age, the antient adage occurs to me, *nemo omnibus horis sapit*. And I believe your dealers in sophistry very often impose upon themselves, as well as upon the world. The frequent use of it perverts some how the natural judgment. And the worst of it is, that the run of mankind cannot see through it. For my own part, I am persuaded, that more mischief might be done to liberty, by putting a man with a clever talent of this sort at the head of the law, than such a boisterous fellow as *Jeffreys*. A violent

magistrate is not so dangerous as a specious sophisticator; the latter with the heart of a deer, and much civility, will compass more perversion of the legal rights of the subjects, than the other with the heart of a lion, and the manners of a bear. Open violence sets every body upon their guard, and is obvious; the other supplants your understanding, and seduces your judgment, by talking always of general principles, and apparently ascending to, or descending from them, by some artificial thread, so curiously wrought, and so thoroughly disguised, as to require almost the touch of Ithuriel's spear to be discovered. I am therefore for Lord *Mansfield's* oracle of resort, (when pressed by the astuteness of cunning pleaders, and their black letter cases) plain *common sense*. Upon this even ground it is, Mr. *Almon*, that I address you, and declare I cannot understand, how a jury finding master *Woodfall* guilty of printing and publishing the paper only, and afterwards, by affidavits, denying upon oath, their belief of the criminal construction laid upon such paper; and all this being disclosed to, and taken notice of by the King's Bench, can by that court be deemed to have found the said *Woodfall* guilty generally of the charge made upon him. To arrive at such a conclusion, I think their progression must be like that of the prince of darkness:

————in many an aery wheel.

I can as soon be persuaded that the stripping

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ping members of parliament of privilege, in matter of libel, by a resolution of both houses, that is, of privilege against crown-prosecutions for writing animadversions upon administration, and leaving it in every petty misdemeanor and trespass against the subject, was a shield for the liberty and freedom of the common-wealth, or agreeable to the meaning of former resolutions, or the law of the land. This, however, is matter of opinion, and I may be mistaken in the whole of it, as recluse individuals frequently are. But were it put to me for my option, and were I a member of parliament, I would much rather have concurred in a resolution establishing the clearly illegal general warrants. And yet I have no predilection for state libellers, and abominate those of them who do not confine themselves to ministers, and their actions as such, but rake into all the passages of their private life, and stir questions tending to the dissolution of the British state, both in its constitution and its empire. The public robber on the highway is, in my own opinion, a less noxious and culpable subject. I wish to go on as we have done, without any novel-ties or refinements in the administration of justice, without one branch of the legislature breaking in upon the other, or any part of the British subjects withdrawing from the dominion of the king and his parliament, the only possible sovereign over the whole. If any private reflections have escaped

escaped from me, I shall lament the lapse, for I bear no personal enmity to any man breathing, and wish only to advert to their public conduct, meaning to die in the same mediocrity and obscurity I have lived, and whilst I stay here to judge of men's actions by my own understanding, and not by the political glosses either of their admirers or their satirists. The deficiency of deep professional learning and practice, must excuse my want of neatness in legal expression, and the seeming elaborate verbosity of my style may crave some pardon, as it is partly occasioned by the desire of being fully understood, and partly by disguise of writing, a natural scantiness of expression, and a very confined sphere of conversation. And I need not add, that if I did not regard some persons as superior beings, and capable therefore of doing much good or hurt, I should not have so much attended to their proceedings, so that my making them the topic of observation is panegyric, as far as my poor words can scatter either praise or blame. Had I been inclined to have taken more pains, I should have been much shorter. The loss on this account will, I fear, Mr. *Almon*, be yours; and if a great book be a great evil, a huge pamphlet is a most enormous one. But I grow old, lazy and stupid. And so once more, good night.

God preserve the state.